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## EXPLANATORY STATEMENT

### Circulated by the Minister for Education and Training

#### *Child Care Subsidy Minister's Rules 2017*

#### Summary

The *Child Care Subsidy Minister's Rules 2017* (the Minister's rules) are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act), subsection 194(5) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Family Assistance Administration Act) and item 12 of Schedule 4 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (the Jobs for Families Act).

The Minister's rules prescribe matters that are required or permitted (or which are otherwise necessary or convenient) as empowered by the primary Acts. In particular, the Minister's rules deal with the following: permitted absences; key additional child care subsidy (ACCS) eligibility requirements; recognised activities and circumstances in which an individual may receive a deemed activity test result for hours of subsidised care; and when a provider or a person related to a provider or service is a fit and proper person for approval purposes. The Minister's rules also set out additional conditions for continued approval, modifications of the primary Acts, and transitional rules.

#### Background

The Jobs for Families Act gives effect to the legislative elements of the Australian Government's new child care package (the package), including the new child care subsidy (CCS) and the ACCS. The package was developed in response to the Productivity Commission Inquiry into Childcare and Early Childhood Learning.

The centrepiece of the package is the CCS, which will replace the existing Child Care Benefit (CCB) and Child Care Rebate (CCR). The CCS will benefit residents using child care services in Australia by simplifying the current child care assistance payments and providing better targeted and more assistance for low and middle income families. The package also includes the ACCS, which will replace the special rates of CCB, known as the Special Child Care Benefit (SCCB) and the Grandparent Child Care Benefit (GCCB), in addition to the Jobs, Education and Training Child Care Fee Assistance payments (JETCCFA), as part of the new Child Care Safety Net.

There are several schedules to the Jobs for Families Act, which commence at various times:

- Schedules 1 and 2, which contain the relevant provisions for the CCS and ACCS measures, commence on 2 July 2018;
- Schedule 3, Part 1, which contains enhanced compliance measures, including the power to take applications for approval as not having been made in prescribed circumstances, commenced on 5 April 2017;
- Schedule 3, Part 2, which contains measures relating to closing enrolment advances, commenced on 1 July 2017; and

- Schedule 4, containing the application, saving and transitional provisions, commenced on 5 April 2017.

Subsection 85GB(1) of the Jobs for Families Act provides that the Minister may make rules prescribing matters that are required or permitted (or are otherwise necessary or convenient) by the Family Assistance Act or the Family Assistance Administration Act. The Minister's rules also include a provision made under subsection 194(5) of the Family Assistance Administration Act (relating to applications for approval), and rules made for transitional purposes under item 12 of Schedule 4 to the Jobs for Families Act, to assist with the smooth and efficient transition from CCB and CCR, to CCS from 2 July 2018 during a two year transitional period.

The Minister's rules comprise of seven parts:

- Part 1 – Preliminary
- Part 2 – Eligibility for child care subsidy and additional child care subsidy
- Part 3 – Amount of child care subsidy and additional child care subsidy
- Part 4 – Approval of providers of child care services
- Part 5 – Provider requirements
- Part 6 – Business continuity payments
- Part 7 – Transitional rules for the Jobs for Families Act.

## **Consultation**

The package reflects extensive consultation and expert analysis over several years commencing with the Productivity Commission's 2014 report into Childcare and Early Childhood Learning. This was followed by a Regulation Impact Statement (RIS) consultation process, three Senate Inquiry processes and ongoing consultation with the sector by the Department of Education and Training (the department).

In developing the underlying policy for the Minister's rules, the department has also consulted extensively with, and taken advice from, a wide range of stakeholders including service providers, early childhood education professionals, States and Territories and other experts. National consultation sessions on the proposed settings of the Minister's rules were held in April, September and December 2016. Further targeted consultation on exposure drafts of the rules were held with key stakeholders in August 2017.

## **Regulation**

The purpose of the Minister's rules is to assist in giving effect to the policy objectives of the Jobs for Families Act and more broadly the package announced by the Australian Government in the 2015 Budget. The broader policy context for the rules, along with the regulatory impact for the package, were outlined and considered in the long form RIS prepared for the package (Office of Best Practice Regulation (OBPR) ID 1872).

The Minister's rules expand on the policy objectives of how particular provisions in the Family Assistance Act and the Family Assistance Administration Act will work in practice. It is also expected that the new, enhanced IT system will reduce regulatory burden currently experienced by families and the child care sector.

The OBPR determined that the Minister's rules only have minor impacts on business, community organisations or individuals, therefore a RIS was not required (OBPR ID 22401).

## Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### *Child Care Subsidy Minister's Rules 2017*

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Legislative Instrument

The *Child Care Subsidy Minister's Rules 2017* (the Minister's rules) are made under subsection 85GB(1) of the *A New Tax System (Family Assistance) Act 1999* (the Family Assistance Act), subsection 194(5) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (the Family Assistance Administration Act) and item 12 of Schedule 4 to the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (the Jobs for Families Act).

The Minister's rules prescribe matters that are required or permitted (or which are otherwise necessary or convenient) as empowered by the primary Acts. In particular, the Minister's rules deal with the following: permitted absences; key additional child care subsidy (ACCS) eligibility requirements; recognised activities and circumstances in which an individual may receive a deemed activity test result for hours of subsidised care; and when a provider or a person related to a provider or service is a fit and proper person for approval purposes. The Minister's rules also set out additional conditions for continued approval, modifications of the primary Acts, and transitional rules.

A summary of the contents of each Part of the Minister's rules is as follows:

Part 1 (Preliminary) contains preliminary matters relating to the name of the rules, commencement, authority and definitions, in addition to rules dealing with interpretative provisions.

Part 2 (Eligibility for child care subsidy and additional child care subsidy) contains:

- circumstances where no one is eligible for child care subsidy (CCS) in respect of a session of care;
- when children are at risk of serious abuse or neglect for ACCS (child wellbeing);
- when an individual is experiencing temporary financial hardship for ACCS (temporary financial hardship); and
- additional eligibility requirements for individuals to receive ACCS (transition to work).

Part 3 (Amount of child care subsidy and additional child care subsidy) contains:

- rules relating to what type of service provides a session of care, including by reference to the age of a child and attendance at school, and the applicable hourly rates of CCS, for the purposes of working out CCS entitlement;

- circumstances in which a written election can be made where an individual has a preference for which hours of care are taken into account first for weekly determinations of entitlement;
- prescribed activities that are taken to be recognised activity for the purposes of an individual meeting the activity requirements, including methods to work out how many hours can be counted towards the individual's recognised activity result; and
- prescribed circumstances in which an individual receives a Minister's rules result, or where a method for working out such a result applies.

Part 4 (Approval of providers of child care services) contains:

- additional requirements for providers making an application for approval for the purposes of the family assistance law;
- additional service eligibility rules which must be met for a provider to be approved in respect of a child care service;
- additional provider eligibility rules which a provider must meet in order for a provider to be approved;
- fit and proper person considerations that are relevant to determining whether a provider and a service satisfy the provider eligibility rules and service eligibility rules;
- additional conditions that an approved provider must comply with;
- a list of child care providers that are exempted from particular requirements for the purposes of approval under the family assistance law;
- consequences of breach of conditions for continued approval; and
- backdating of approvals and modifications of the Family Assistance Administration Act, the Family Assistance Act, and the Jobs for Families Act in respect of certain specified persons and periods.

Part 5 (Provider requirements) contains:

- requirements to notify Secretary of certain matters; and
- requirements in relation to children of a prescribed class of sessions of care for which there is no eligibility for CCS.

Part 6 (Business continuity payments) contains the circumstances in which business continuity payments can be made, and the method for working out an amount of payment.

Part 7 (Transitional rules for the Jobs for Families Act) contains rules made for transitional purposes during a two year transitional period.

## **Human rights implications**

The Minister's rules engage the following rights:

- the rights of the child under the *Convention on the Rights of the Child* (CRC), particularly Article 3, 18(2), 19 and 27;
- the right to work and the right to social security under Articles 6 and 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);

- the right to protection against arbitrary and unlawful interferences with privacy, family and home under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), and under Article 16 of the CRC; and
- the rights contained in the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), particularly Articles 10 and 11.

### *Rights of the child*

Article 3(1) of the CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 3(3) requires institutions and services responsible for the care of children to conform to standards including maintaining suitability of staff. Article 18(2) also requires States Parties to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and ensure the development of institutions, facilities and services for the care of children.

Although primary responsibility for ensuring child care services and staff are appropriately qualified, and that care provided conforms to certain quality and safety standards, rests with the State and Territory authorities, the Commonwealth has also taken steps to supplement and complement those regimes. The Minister's rules therefore reflect an increasing recognition of the importance of cooperation between the various levels of government.

In particular, the provider and service eligibility rules in Part 4 of the Minister's rules provide additional criteria to that which is contained in the primary legislation, and against which the Secretary must assess applications for approval, for extra assurance that applicants and their staff are suitable to provide child care services.

For instance, there are additional matters contained in section 46 of the Minister's rules which go towards whether or not a person is a fit and proper person, by taking into account the experience and expertise of the provider or person with management or control in the provision of child care services. A family day care educator's qualifications must also have been obtained independently and on merit, rather than in circumstances that suggest the existence of a conflict of interest which may decrease the level of trust the Secretary can place in a family day care educator's qualification and ability to provide appropriate care.

Providers must also satisfy the Secretary that they have met the additional requirements for approval under section 43, which relate to important matters that place the best interests of the child first, being the need to have undertaken a national police check and working with children card checks for persons with management or control, day-to-day operational responsibility of a child care service and family day care educators. Providers will also be required to notify the Secretary if any such person is charged or convicted or has a finding of guilt made against them in respect of serious offence, including any violent or sexual offences.

Services must also have in place any approvals or licences required to operate the service under the law of the State or Territory in which the service is situated. This generally requires the provider to be approved under the *Education and Care Services National Law Act* (2010) (Vic) (the National Law) (as applied in other State and Territory jurisdictions and which relates to the monitoring of the quality of child care services). This allows for consistency between the separate approval regimes that exist under State or Territory legislation (primarily the National Law) and the family assistance law. It also ensures that providers are

only approved if they have also satisfied the relevant State or Territory authority of its ability to comply with quality and safety standards, and suitability to provide child care services. The ongoing National Law approval also forms a condition for continued approval so that a provider's approval under the family assistance law may be affected by any suspension or cancellation of National Law approval. Having a consistent approach supports the effective monitoring of services to ensure the quality and consistency of care across services, which is in the best interests of the children being cared for, and therefore promotes the rights of the child. Where an exception is granted in respect of services that are not required to hold National Law approval (see section 50), Part 4 of the Minister's rules also set out quality and safety measures that must be complied with by the provider in respect of that service to remain approved (see section 49). These measures require demonstrating a commitment to high quality child care, notifying of serious incidents and managing work health and safety matters, amongst other things.

Article 19 of the CRC requires States Parties to take all appropriate measures to protect the child from all forms of injury or maltreatment while in the care of any person. This includes setting effective procedures to provide necessary support for the child and those who provide care for the child. As mentioned above, the Minister's rules require providers to carry out certain checks to ensure staff are suitable to provide care, to avoid risk of harm or injury to a child. The ACCS (child wellbeing) payment is also designed to address barriers faced by children and individuals in certain vulnerable situations, in being able to access quality child care. The Minister's rules outlines circumstances in which a child is taken to be at risk of serious abuse or neglect, or where an individual is taken to be experiencing temporary financial hardship, so that an individual or child care provider can be eligible for ACCS payment to care for that child.

#### *Right to an adequate standard of living*

Article 27 of the CRC requires that States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Article 27(3) requires States Parties to take appropriate measures to assist parents and others responsible for the child to support the child's development.

The Minister's rules advance this right through the CCS and ACCS which will address barriers to accessing child care to ensure all children, regardless of their parents' income, have access to an adequate amount of child care to aid socialisation and development where their parents meet the activity test.

#### *Right to work*

Article 6 of the ICESCR requires that State Parties recognise the right to work, including through developing policies and techniques to achieve steady economic, social and cultural development and full and productive employment.

The Australian Government is maintaining its commitment to support workforce participation and assist working families with the cost of child care. The right to work goes to the core objective of the Jobs for Families Act, to help parents who want to work, or who want to work more. The Minister's rules reinforce this commitment by ensuring child care fee assistance is paid in a broad range of circumstances that will further the capacity of

individuals to engage in work, study, training and other activities that promote workplace participation and engagement.

In particular, the ‘recognised activities’ provisions in Part 3 significantly expand the types of activities that will be recognised for the purposes of establishing CCS entitlement, to include those that may not neatly fit within the conventional categories of paid work, study or training. For example, hours spent by individuals working for a family business, or those involved in setting up a business, or volunteering at certain organisations, will be taken into account to calculate an individual’s entitlement to subsidised child care. Individuals who work under arrangements that vary in hours from fortnight to fortnight (such as shift workers), will be given a set result based on their most active fortnight, which will apply for a longer period and give the individual more stability in choosing appropriate child care arrangements. The flexibility inherent in the rules acknowledges the changing landscape of modern work arrangements, which are no longer primarily composed of a typical employer-employee relationship and a fixed number of hours. The rules recognise that paid work is not the only type of work that can further an individual’s workplace participation and engagement. Volunteering and establishing a business, for instance, can also provide an individual with valuable skills to enter the workforce and should therefore be supported to the extent possible, through child care fee assistance. In light of this, the Minister’s rules enhance an individual’s capacity to freely choose and accept work that suits their particular needs by providing a reasonable number of hours of subsidised child care in a broad range of circumstances.

In addition, the ACCS (transition to work) payment is designed to support an individual who is transitioning into work. The ‘transition to work’ provisions in Part 3 broaden the types of ‘transition to work payments’ an individual must be in receipt of, from those contained in the primary legislation, for the purposes of establishing the eligibility of a larger cohort to the additional child care subsidy payment. By incorporating further payments, and allowing the existing requirements to have an employment pathway plan or participation plan in place to also be met through voluntary plans, a broader range of individuals are assisted by the payment whilst also being encouraged to meet certain goals relating to finding work and other opportunities, as set out in job plans.

### *Right to social security*

Article 9 of the ICESCR recognises the right of everyone to social security. Under the Minister’s rules all individuals who meet basic eligibility criteria will be eligible for some fee assistance through the CCS, so long as they also meet an income and activity test. Additionally, children at risk of serious abuse or neglect, individuals experiencing temporary financial hardship and individuals transitioning from income support to work will be eligible for further support through ACCS payments that will ensure all children have access to adequate child care.

### *Right to privacy*

Article 17 of the ICCPR and Article 16 of the CRC requires that no one shall be subject to arbitrary or unlawful interference with privacy. Australia interprets the term ‘unlawful’ as being taken to mean that no interference should occur except in cases envisaged by the law and the law itself must comply with the provisions, aims and objectives of the ICCPR. Interference provided for by law can be arbitrary if the law is not in accordance with the



provisions, aims and objectives of the ICCPR and is not reasonable in the particular circumstances. The Australian Government has accepted that the term ‘arbitrary’ could encompass interferences which although lawful, would be ‘unreasonable’. ‘Reasonable interferences’ with privacy are measures based on reasonable and objective criteria which are proportional to the purpose for which they are adopted.

Parts 4 and 5 of the Minister’s rules contain several requirements placed on providers to give the Secretary information that may be considered ‘personal information’ or ‘sensitive information’ under the *Privacy Act 1988* (Cth). For instance, the provider is required to notify the Secretary if a person with management or control, or a person with responsibility for the day to day operation of a service, or a family day care educator has been convicted of a serious offence (see section 55). Providers must also give the Secretary contact details of persons with management or control (including persons with responsibility for the day to day operation of a service) and family day care educators. The Secretary must also collect personal information to be satisfied that a provider or a person with management or control (including persons with responsibility for the day to day operation of a service) is a fit and proper person to be involved with the service, by reference to considering the person’s history of fraud or dishonesty and the qualifications of educators engaged by the service, amongst other things (see section 46). Any limitation on the right to privacy is reasonable and proportionate, given the objective is to allow the Secretary to make robust decisions to only approve providers and services which demonstrate suitability to provide child care services, which is ultimately in the best interests of the child.

Providers are also required to give the Secretary, on request, the personal and/or sensitive information it collects through the register it completes when it provides care to children within certain categories (see sections 8 and 56). For instance, the provider may need to record and report to the Secretary the customer reference number of individuals who have engaged the provider for care, as well as documentary evidence relating to whether a child has been diagnosed with a disability, is a remote area child etc. The purpose of the obligations in section 56 is to allow for the monitoring of, and assurance that, care is being accurately reported to the Secretary, and that calculations of CCS amounts can be done accurately. In the absence of such obligations, there is a substantial risk of an increase in incorrect calculations and, in some cases, fraudulent activity, which would severely compromise the integrity of the payment scheme could be severely compromised. These requirements do not go any further than what is necessary to ensure the integrity of the child care payments scheme.

Further, there are a number of safeguards in place in relation to the information that is collected and disclosed by the provider. This includes that the *Privacy Act 1988* applies in relation to the management by the provider of information collected. In addition, any information collected by the provider and provided to the Secretary will, once it is obtained and recorded by the Secretary, be subject to the confidentiality provisions in sections 161 to 168 of the Family Assistance Administration Act.

To the extent that the right to privacy is limited, the limitation is reasonable and proportionate and as such, this instrument is compatible with the right to privacy.

### *Right to be free from discrimination*

Articles 10 and 11 of the CEDAW mandates States Parties to take all appropriate measures to eliminate discrimination against women in the field of education and employment, by providing, amongst other things, the same conditions for career advancement and vocational guidance.

The Minister's rules support measures in the primary legislation which seek to make child care simpler, more affordable and more flexible, to seek to alleviate some of the current pressures experienced by families, some of which have a negative and disproportionate impact on women. Through broadening the kind of activities that will be 'recognised activities' and providing a deemed Minister's rules result to individuals who are in circumstances that may affect their capacity to engage in recognised activity, the Minister's rules take measure to ensure wider coverage of individuals, and women in particular, who may not be engaged in the workforce. For instance, women who are providing the primary caregiver role for a relative with a disability, are eligible for a deemed result under section 37. Women who may be engaged in shift work, and therefore do not have a set roster, are able to receive a recognised activity result based on their most active fortnight, to help them find more stable child care arrangements despite their variable work schedules (see section 30). Women who are on leave from work, or in a semester break, are also considered to be engaged in recognised activity, despite the fact such activities may not be conventionally regarded as an activity. The Minister's rules therefore acknowledge that individuals, and women in particular, may require more flexible child care arrangements to minimise any interferences such variable circumstances may have on their capacity to enrol their children for care on a regular basis.

### **Conclusion**

The Minister's rules are compatible with human rights. Measures in the Minister's rules are compatible with and advance human rights under the CRC, ICCPR, ICESCR and CEDAW. These measures ultimately enable parents who wish to work by providing a simpler, more affordable and access, and with the aim that children can have access to care that promotes their development and wellbeing.

**Senator the Hon Simon Birmingham, Minister for Education and Training**

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## **Explanation of the provisions**

### **Part 1 – Preliminary**

#### *Division 1 – Preliminary*

Division 1 contains preliminary matters relating to the name of the rules, commencement, authority and definitions.

**Section 1** states the name of the instrument as the *Child Care Subsidy Minister’s Rules 2017* (the Minister’s Rules).

**Section 2** states that all provisions of the Minister’s rules commence on 2 July 2018, alongside the commencement of Schedule 1 to the Jobs for Families Act, except for section 41. Section 41 (cut-off date for certain applications) commences from the day after the Minister’s rules are registered, as it relates to applications that are made for approval under the family assistance law before the commencement day (that is, before CCS starts).

**Section 3** states that the Minister is authorised to make the Minister’s rules under subsection 85GB(1) of the Family Assistance Act, subsection 194(5) of the Family Assistance Administration Act, and item 12 of Schedule 4 to the Jobs for Families Act. Subsection 4(2) of the *Acts Interpretation Act 1901* is relied upon to provide the necessary authority for the making of all provisions of the Minister’s rules, other than section 41 and Part 7, prior to the commencement of the relevant empowering provisions.

**Section 4** contains definitions of terms used in the Minister’s rules. A note clarifies that a term used in the Minister’s rules that is defined in the Family Assistance Act or the Family Assistance Administration Act has the same meaning as it has in the relevant Act.

#### *Division 2 – Interpretative matters*

Division 2 relates to interpretative matters.

**Section 5** sets out when an individual is taken to be an Australian resident, through a determination made by the Secretary under subsection 8(3) of the Family Assistance Act. To be eligible for CCS and ACCS, an individual must be an Australian resident. However, in circumstances prescribed by this section, the Secretary can determine that an individual is taken to be an Australian resident for the purposes of CCS eligibility, if the individual would otherwise experience hardship. In considering whether to make a determination, the Secretary is to take into account matters such as whether the individual has experienced an event that was not reasonably foreseeable since arriving in Australia, and whether this has substantially reduced her or his ability to pay child care fees. Additional factors to be taken into account include how long ago the event occurred, and considering whether attendance at child care is in the best interests of the child. Certain matters are prescribed as factors that cannot be taken into account, such as currency fluctuations.

**Section 6** sets out the kinds of additional absences that are permitted. Under section 10 of the Family Assistance Act, an approved child care service is taken to have provided a session of care to a child for up to 42 days of absences in a financial year, if the child was enrolled for care and was absent for the whole session and certain conditions are met. However, beyond the initial 42 days of absences, a child care service is only taken to have provided a session of

care if certain additional conditions set out in subsection 10(3) are met, in addition to requiring the absence to be for a reason listed in the Minister's rules. Where an absence occurs on a day that a session of care is taken to be provided, an individual can be entitled to CCS payments for that session. This section sets out the additional absence reasons for the purposes of determining whether the service is taken to have provided a session of care or not. The prescribed reasons include: where the child has not been immunised and was absent during the immunisation grace period and the service provider holds a medical practitioner's written statement certifying that exposure would pose a health risk to the child; where the absence is because the child is required to spend time with another person under a court order or a parenting plan; and where the service is closed as a direct result of a period of local emergency or the child cannot attend as a result of the local emergency, including after the period of local emergency has ended. Period of local emergency is defined in the rule to refer to the impact of a certain event (whether covered by a disaster declaration or considered significant due to other characteristics) on the ability of children to safely attend the service for care.

**Section 7** specifies certain payments that are 'child care service payments' under subsection 3(1) of the Family Assistance Administration Act. These are payments made under a funding agreement associated with the grant programs of the Community Child Care Fund, the Inclusion Support Programme and the Interim Home Based Carer Subsidy Pilot Programme. Where a payment is a 'child care service payment' it is possible that CCS or ACCS debts owed by providers can be recovered by offsetting against (that is, reducing) those payments.

## **Part 2 – Eligibility for child care subsidy and additional child care subsidy**

### *Division 1 – Circumstances where no one is eligible for a session of care*

Division 1 outlines circumstances where no one is eligible for CCS in respect of a session of care. Under section 204B of the Family Assistance Administration Act, providers must provide reports containing accurate and complete information to enable the Secretary to properly assess eligibility and entitlement in respect of sessions of care that have been provided. As part of complying with this key obligation, and others in the family assistance law requiring persons to not make false or misleading statements, providers must accurately report whether or not a session of care was provided. A failure to do so, including by reference to this rule, may constitute a breach of certain conditions for continued approval under the family assistance law, as well as triggering potential civil and criminal liability.

**Section 8** prescribes circumstances where there is no eligibility for a session of care. In addition to other requirements that apply in section 85BA of the Family Assistance Act, for an individual to be eligible for CCS for a session of care, the session of care must not be provided in the following circumstances:

- where care is provided on premises that are not recognised as attributing to a session a care, including on a transportation vehicle (paragraph (a)) such as a bus (unless the transport is incidental to the session of care), or in a domestic living arrangement (paragraph (b)) such as the child's own home or where the parent remains present;
- where care is provided by an individual required to hold a working with children card under section 195D of the Family Assistance Administration Act, but the individual does not hold a card by the time the session of care is provided or the details of the card have not been provided within the time required by the rule (paragraph (c));

- where care is provided by an family day care (FDC) educator to a child who is related to the FDC educator or the FDC educator's partner in circumstances that would constitute a 'parent-child relationship' (for instance the child is an FTB child, a regular care child, a foster care child, biological or adopted child, or a child for whom the individual is legally responsible for), or a 'brother-sister relationship' (including biological, adoptive, half-brother, half-sister, step-brother or step-sister relationship) (paragraph (e));
- where the child attends school (including home school or distance education program) during any part of the session (paragraph (f)).

In addition to the above categories, no-one is eligible for a session of care provided by an FDC service where care is provided to an 'FTB child' or 'regular care child' (as defined in subsection 3(1) of the Family Assistance Act) of an FDC educator or the FDC educator's partner, on a day that the FDC educator provides care at an FDC service, unless a specified circumstance under subsection 8(2) of the Minister's rules applies (paragraph (d)). This practice is known as 'child swapping' because in these circumstances it is generally assumed that the child could stay at home with their own parent (who is an FDC educator), rather than attending another FDC service. The specified circumstances, where an individual may be eligible despite child swapping, include where:

- the child is an 'eligible disability child' (see subsection 8(5))

This specified circumstance applies if the child has been diagnosed within the last 24 months (unless the diagnosis is, or is likely to be, permanent) as having one of the disabilities listed in Schedules 1 or 2 of the Minister's rules, and documentary evidence of this has been provided to the approved FDC service providing care to the child.

- the child is an 'eligible ISP child' (see subsection 8(5))

This specified circumstance applies if the child is being provided sessions of care by an approved FDC service that is receiving funding, under a funding agreement entered into under the auspices of the Commonwealth Inclusion Support Programme (ISP), of Inclusion Development Fund (IDF) Family Day Care Top Up, for that child because the child is undergoing assessment for disability, as referred to in the Inclusion Support Programme Guidelines 2016-2017 to 2018-2019.

Note that the definition of 'eligible ISP child' in section 8 incorporates the *Inclusion Support Programme Guidelines 2016–17 to 2018–2019* (ISP Guidelines). The ISP Guidelines are intended to be incorporated as they existed at the time the Minister's rules were made on 7 November 2017 (which is also the form in which they existed when they were first produced). The ISP Guidelines contain information for Early Education and Child Care services and other stakeholders about the programme's objectives, types of support available under the ISP and how to access it. The document is available free of charge from the website of the Department of Education and Training. At the time of writing, the relevant URL is: <https://docs.education.gov.au/documents/inclusion-support-programme-guidelines>. A copy of this document will be made available free of charge to people affected by, or interested in, the Minister's rules on request to the Department.

- the child is a 'remote area child' (see subsection 8(5))

This specified circumstance applies where an FTB child or regular child of an individual resides in ‘remote Australia’ or ‘very remote Australia’ in accordance with the *Australian Statistical Geography Standard (ASGC) Volume 5 – Remoteness Structure*, July 2011 (cat. no. 1270.0.55.005), published by the Australian Bureau of Statistics, and documentary evidence of the child’s residential address has been provided to the service. A note clarifies that documentary evidence of a child’s residence could include a copy of the individual’s (in relation to whom the child is an FTB child or a regular care child) current driver’s licence, or a recent utility bill sent to the address where the individual and child ordinarily reside, or a statutory declaration.

- the FDC educator is required to work or is enrolled in a program in the manner described in paragraphs 8(2)(d) or (e) of the Minister’s rules respectively, and has provided documentary evidence in accordance with subsection 8(4) and section 56 (relating to a register) of the Minister’s rules.

Subsection 8(4) outlines requirements in relation to the documentary evidence, including that the provider must hold the documentary evidence by the time an attendance report under section 204B of the Family Assistance Administration Act needs to be given for the first session of care to which the evidence relates, and the provider must have met the requirements to keep a register, as set out in section 56 of the Minister’s rules, in relation to the evidence.

For clarity, the timeframe in which the documentary evidence is required to be provided is in accordance to paragraph 204B(2)(d) of the Family Assistance Administration Act, which is no later than:

- 14 days after the end of the week in which the session of care was provided; or
- If the week is in a period, or a series of consecutive periods, relating to a payment under section 205A (Business continuity payment) under the Family Assistance Administration Act – 14 days after the end of the period, or the last of such period; or
- If the enrolment notice is given under subsection 200A(2) (Enrolment notices) of the Family Assistance Administration Act – the day the enrolment notice is required to be given under that subsection, which is no later than 7 days after the relevant week of enrolment.

The documentary evidence only needs to be provided once within the relevant timeframes applicable to giving the first attendance report that covers sessions of care for which a specified circumstance applies. That is, there is no intention to impose a requirement upon the individual to provide the service with the same documentary evidence on a weekly or fortnightly basis where the specified circumstance is ongoing (which is how frequently attendance reports are usually submitted). This general rule is subject to circumstances changing, such as (for example) the child being enrolled in a different approved FDC service, or a diagnosis of the child’s condition being updated. Where circumstances change, an individual (or a service, where applicable) which seeks to assert that a specified circumstance applies in relation to further sessions of care provided to the child will be obliged to provide fresh documentary evidence within the same timeframes stipulated in subsection 8(4), to

assess whether the specified circumstance continues to apply in relation to sessions of care provided to that child.

In addition to the above, for the work or study specified circumstances, the documentary evidence needs to be of a particular kind to be provided in accordance with subsection 8(4). For the work related circumstance to apply, the documentary evidence must show a person's usual hours of work in order to establish that these hours conflict or overlap with the session of care. The usual hours of work are typically set out in an employment contract or payslip. Where this is not the case, the relevant employer must provide a signed letter confirming the usual hours of work. For the study related circumstance to apply, a copy of an enrolment form detailing the usual study requirements and hours the person is formally engaged in the study must be provided, again to establish whether the session of care overlaps or conflicts with the study. Where the enrolment form does not contain these details, it must be supplemented by additional evidence such as an official course timetable.

Subsection 8(5) inserts definitions used in the rule. In particular, the term 'engaged in activities', reflects the intent that the 'education' specified circumstance only relates to formal programed educational activities, occurring at a time that usually overlaps or conflicts with the session of care, and that are outside the control of the FDC educator. Programed educational activities may include lectures that must be attended (in person or online) at a time determined by the educational institution, and where the person cannot reasonably opt to undertake those courses at a time that would not conflict or overlap with the session of care.

**Example:** Rhys, an FDC educator, is also enrolled in a Diploma of Disability. Rhys provides sessions of care to three children, and in addition looks after his daughter at the same time, every Monday between 9am to 4pm. He attends a lecture and a workshop that same day at the campus from 5pm to 9pm, and so he books a session of care with another approved FDC service for his daughter from 4.30pm to 9.30pm. At the beginning of the semester, Rhys was given the option of attending the lectures on a Thursday morning, but Rhys did not select the option as he worked part time as a disability support worker during that time. Rhys may be eligible for the study specified circumstance in relation to his daughter as, despite having provided sessions of care on the Monday, the lecture and workshop are at a time that he cannot reasonably control, and the session of care provided to his daughter that evening overlaps with his compulsory attendance requirements. However, if Rhys did not work part time on the Thursday morning, then he could reasonably be expected to request enrolment into that alternative lecture and workshop, and thus provide care for his daughter on Monday night himself, without requiring the services of another approved FDC service. In this latter case, he would not be eligible for CCS for his daughter if he does book a session of care as participation in the lecture and workshop that evening could reasonably occur on a different day that is not the care day.

#### *Division 2 – When children are at risk of serious abuse or neglect for ACCS (child wellbeing)*

Division 2 relates to determining eligibility for ACCS (child wellbeing). The ACCS (child wellbeing) payment is designed to further reduce the cost of child care for families through an additional subsidy for children who are at risk of serious abuse or neglect. For the payment to be made, there must be a certificate or a determination in effect (see sections 85CB and 85CE of the Family Assistance Act) stating that a child is at risk of serious abuse or neglect, in accordance with the circumstances prescribed in this Division.

A certificate can be given by an approved provider for up to six weeks where the provider considers that a child is at risk of serious abuse or neglect on a day, by reference to the circumstances set out in this Division. This allows approved providers to respond to emerging

situations by giving practical support to ensure that the cost of child care is not a barrier to children at risk from either entering or remaining engaged with child care.

After the capacity for a provider to give a certificate has been exhausted, the approved provider can make an application for a determination in relation to additional periods. The application should be accompanied by material that supports the provider's view that the child is at risk in accordance with the circumstances set out in this Division. The Secretary can make an initial determination of up to 13 weeks and may make further determinations, where a determination is already in effect. This will allow for ongoing ACCS to be paid without the requirement to make a fresh application for each determination.

**Section 9** prescribes the circumstances in which a child is taken to be at risk of serious abuse or neglect. A child is so taken if the child is at risk of experiencing harm, as a result of current or past circumstances or events that resulted in the child being subject to, or exposed to: serious physical, emotional or psychological abuse; sexual abuse; domestic or family violence; or neglect. 'At risk' is defined to also include situations where the child is likely to experience those circumstances in the future, in that the risk is 'real and apparent'. This requires the provider and/or Secretary to make a reasonable assessment based on some form of evidence, rather than just speculation. This inclusive definition allows for families to be eligible for the subsidy at the appropriate earliest point and potentially before they are known to a child protection agency.

An approved provider will be able to make an initial assessment based on information provided to it by a third party or based on their observations and give a certificate. This will assist vulnerable families to receive the additional subsidy quickly as part of the practical help to support their child's safety and wellbeing.

In order for individuals or the provider to receive ACCS for ongoing periods, the approved provider will be required to supply evidence to support its assessment that the child's circumstances fits within the criteria.

**Section 10** refers to children who are already recognised as requiring additional protection under state or territory based child protection legislation, as children who are taken to be at risk of serious abuse or neglect. Having regard to the criteria under state or territory based child protection legislation in relation to vulnerable children, these children are taken to be at risk of serious abuse or neglect for the purpose of ACCS (child wellbeing) regardless of their circumstances or living arrangements.

***Example:*** Sara has been placed in foster care under a court order because it is no longer safe to live in the parental home. She spends part of the week with her foster carer and part of it with her grandparents. No matter where she resides, a determination will ensure that the subsidy is applied against the child care fees charged by an approved provider.

**Section 11** sets out circumstances which, considered in isolation, are not sufficient indicators that a child is at risk of serious abuse or harm. These include: the income of the individuals with respect to whom the child is an FTB child or regular care child (generally, their parents); the ethnic, cultural, religious or racial background of the child or their immediate family; the geographical location in which the child and their immediate family resides; the child's place of residence, whether the child is likely to benefit from early childhood education and care programs; disability; or any foster care or kinship care arrangement. However, when



considered together, these circumstances may assist in determining whether a child is at risk of serious abuse or neglect of the kind prescribed in section 9.

**Example 1:** Faiz's family is of Hazara ethnicity. In isolation, his ethnicity alone would not result in being considered to be at risk. However, if he or his family witnessed (or were subject to) persecution because of their ethnicity, then ethnicity may inform the overall consideration that he is 'at risk' where he continues to suffer from the impact of the persecution, even it has stopped.

**Example 2:** Tim and Camille receive income support as their sole source of income. In itself, that does not mean that Nopporn, their child, is 'at risk'. Camille spends most of their income on gambling, which means that regularly Nopporn misses out on meals because there is no food in the house. Being on a low income is part of the context, but not the sole reason, why Nopporn is being neglected. In this case, Nopporn's circumstances, when considered in full, would meet the definition of being 'at risk'.

**Example 3:** Avery has a diagnosed speech and learning disability and the Speech Pathologist has suggested that regular attendance at child care might benefit language development, by spending time with other children. In and of itself, having a disability does not mean that Avery would be 'at risk' and nor does potentially benefitting from child care mean that Avery would be 'at risk'.

### *Division 3 – Temporary financial hardship*

Division 3 relates to determining eligibility for the ACCS (temporary financial hardship) payment. For the payment to be made there must be a determination in place (see section 85CH of the Family Assistance Act) stating that the individual is experiencing temporary financial hardship, in accordance with the circumstances prescribed in this Division.

**Section 12** prescribes circumstances in which an individual is taken to be experiencing temporary financial hardship for the purposes of making a determination under section 85CH of the Family Assistance Act. The section is designed to target individuals who are experiencing financial hardship for reasons which are outside the individual's control and which reduce her or his ability to pay child care fees, in an effort to assist with continuity of child care for the individual's child. In relation to all circumstances, the individual must be experiencing financial stress due to an event which has occurred in the six months before an application for ACCS (temporary financial hardship) is made.

A range of circumstances are set out in subsection 12(2). Some circumstances relate to those that have happened to the individual, whilst others allow for a partner's circumstance to also be taken into account, where the partner's circumstance can be expected to have a direct impact on the individual's ability to pay child care fees.

For the purposes of paragraph (2)(d), 'privately' is intended to have the same meaning as that within the Child Support context, namely that parents can register their Child Support case with the Department of Human Services (Human Services) as either a Human Services 'collect' case or as a '**private**' (non-Human Services-collect) case - which means that child support payments are managed by the parents without Human Service's intervention and Human Services does not keep a record of payments as agreed between the individuals.

The reduction in the ability to pay must be as a result of the circumstance and must be substantial. For example, an individual taking two weeks of leave without pay from their job for the purpose of recovering from minor surgery would not be considered to constitute a substantial reduction in the ability to pay child care fees, unless there is compelling evidence to support the determination of financial hardship.

An individual will be able to indicate on the application that more than one circumstance has occurred that led to temporary financial hardship. In that case, the delegate will only consider one or some of the identified circumstances in order to reach the threshold and is not required to assess all circumstances. The circumstances considered to make the determination will be clearly identified in the content of the determination. This is to allow the individual to seek further periods of ACCS (temporary financial hardship) in relation to circumstances that have not been considered as part of an earlier determination if they continue to experience financial hardship due to that event.

**Example:** Deb and Reese's house was inundated by flood waters and the family needed to move into rented accommodation. Three weeks later, Deb's temporary employment came to an end. The financial burden of paying both a home loan and rent was sufficient for the Secretary to determine that Deb's application was successful. The cessation of temporary employment was not considered, leaving it open to Deb to make a further application if the loss of employment continued to have an impact on the capacity to pay for child care fees for further determinations to be made.

#### *Division 4 – Transition to work*

Division 4 prescribes additional eligibility requirements for individuals who are receiving a 'transition to work payment'.

**Section 13** outlines additional requirements that must be met in order for an individual to be eligible for the ACCS (transition to work) in accordance with subsection 85CK(1) of the Family Assistance Act.

Under subsection 85CK(1) of the Family Assistance Act, the individual must be eligible for CCS for the session of care, and receive (within the meaning of subsections 23(2) and (4) of the *Social Security Act 1991*) a transition to work payment which is defined in subsection 85CK(3), and must satisfy any requirements prescribed under the Minister's rules.

This section describes the requirements that individuals must meet, at the start of each CCS fortnight to which the session of care relates, to be eligible for ACCS (transition to work) for sessions of care that are provided to a child in a week.

Subsection 13(2) outlines the activity requirements, where an individual must meet at least one of the following: study requirements under subsections 13(7) and (8), or the job search requirements under subsection 13(10), or the work/training requirements under subsection 13(11). The maximum period during which an individual is eligible for ACCS (transition to work) in relation to each type of activity requirements is limited to the period set out in the time limits table in subsection 13(12), unless subsections 13(13) and 13(14) apply to alter those limits.

The income requirements are outlined in subsection 13(3), where the estimate of the individual's adjusted taxable income for the income year in which the CCS fortnight starts must be equal to or lower than the lower income threshold in clause 3 of Schedule 2 (Amounts of CCS and ACCS) to the Family Assistance Act, which is \$65,710 as at 1 July 2018 and indexed in Schedule 4 to the Family Assistance Act. The term 'adjusted taxable income' is defined in Schedule 3 to the Family Assistance Act and includes the income of any partner of an individual. An individual's adjusted taxable income may be determined by Division 4 of Part 3A of Family Assistance Administration Act (Estimates etc. of adjusted taxable income).

The study requirements under subsection 13(7) require an individual to be studying an approved course of education or study, limited to a secondary course, preparatory course or level 2 (Certificate II) through to level 8 (up to Graduate Diploma) of the Australian Qualifications Framework.

An individual is required to make satisfactory progress under paragraph 13(7)(b) and evidence of satisfactory progress will be based on transcripts of results and consideration of this aspect may take into account any special circumstances that apply to the individual.

Once each level of a course of education or study is completed, or the time period set out in the time limits table in subsection 13(12) for that level is exhausted, to be eligible for a further period of ACCS (transition to work) a subsequent course of education or study must be at a higher level (see paragraph 13(7)(c)).

The initial course of education or study must be above any level that the individual has studied at within the last ten years, with three exceptions:

- subparagraph 13(7)(c)(i) enables an individual to withdraw from a course within six weeks, on one occasion, and not have that level of study considered for the purposes of ACCS (transition to work); and
- subparagraph 13(7)(c)(ii) enables an individual to study at a level below a qualification already achieved, once, for an occupation on the Skills Shortage List, she or he has not already studied towards; and
- subparagraph 13(7)(c)(iii) relates to individuals who are in receipt of the Jobs Education and Training Child Care Fee Assistance (JETCCFA) payment on 1 July 2018. Where this applies, the individual is exempt from the requirement for the course of education or study to be at a higher level than the individual has already studied at within the last ten years, for the course of education or study that they were in receipt of JETCCFA for on 1 July 2018, and enables them to continue to study that same course.

**Example:** On 1 July 2018, Cecily was studying towards a Certificate III in Child Care and expects to finish sometime in late 2018. On 2 July 2018, Cecily will be able to continue with these studies, rather than being required to step up to a Certificate IV or higher.

The reference in subparagraph 13(7)(c)(ii) to the Skills Shortage List is a reference to the version of the document as it existed at the time the Minister's rules are made, being 7 November 2017. In 2017, this document was available from the website maintained by the Department of Employment (at the time of writing, this was the Department for which the Minister administering the *Fair Work Act 2009* was responsible):  
<https://docs.employment.gov.au/documents/skill-shortage-list-australia>.

A copy of the Skills Shortage List will also be made available free of charge to people affected by, or interested in, the Minister's rules on request to the Department of Education and Training.

However, the effect of paragraph 13(8) is that, once she or he completes this particular course of education or study, the requirement in paragraph 13(7)(c) will apply to the individual in

respect of any further course of education or study the individual engages in for the purposes of ACCS (transition to work).

The job search requirements under subsection 13(10) require an individual to be actively looking for work and requires them to be able to provide evidence of looking for work.

The work/training requirements under subsection 13(11) require an individual to be in paid work, actively setting up a business or in unpaid work, which includes work experience placements or an internship. The time period set out in the time limits table in subsection 13(12) is a cumulative limit for all of the activities in paragraphs 13(11)(a), (b) and (c). That is, an individual who engages in a combination of those activities, will only be eligible for ACCS (transition to work) on that basis for a maximum period of 26 weeks.

The additional work/training time periods set out in the time limits table in subsection 13(12) provide a separate time limit for both vocational training programs, and other programs that have a reasonable likelihood of improving the individual's employment prospects under paragraph 13(11)(d).

Subsections 13(13) and 13(14) relate to individuals who are in receipt of the JETCCFA payment on 1 July 2018.

Subsections 13(13) and 13(14) read together, reduces the maximum period of eligibility for ACCS (transition to work) for that activity in the time limits table in subsection 13(12) by the time they have already been in receipt of JETCCFA for that activity.

**Example:** On 1 July 2018, Mike was studying towards a three year degree in Engineering and had received 24 weeks of payments under JETCCFA. On 2 July 2018, Mike can continue studying and will be eligible for up to 132 weeks of ACCS (transition to work) subsidy for full time study (156 weeks minus 24 weeks) (assuming he meets all other eligibility requirements).

If the individual is in receipt of a transition to work payment under paragraph 85CK(3)(b) of the Family Assistance Act and specified in paragraphs 15(a), (b), (e), (f), (g) or (h) of the Minister's rules, the individual must meet the Job Plan requirements as set out in subsections 13(4), (5) and (6) of the Minister's rules. A 'job plan' is defined to encompass the mandatory plans that are entered into in respect of particular payments (for example, individuals in receipt of newstart allowance are generally required to enter into a Newstart Employment Pathway Plan) or a voluntary plan equivalent. Individuals who are not subject to mutual obligation requirements, and are not required to have a mandatory plan for the purposes of their income support payment, are able to have recognised a plan which has been voluntarily entered into as an equivalent to the mandatory plan, as outlined in subsection 13(6), for the purposes of ACCS (transition to work).

The intent behind covering voluntary plans as well, is to accommodate individuals who receive a transition to work payment but are not required, for the purposes of receiving that payment, to have an employment pathway plan or a participation plan in effect. Where the individual has entered into a voluntary plan, she or he will have met this requirement for the purposes of receiving the ACCS (transition to work) payment.

If the individual is in receipt of special benefit under the *Social Security Act 1991*, the individual has an additional eligibility requirement where the individual must also qualify for

parenting payment or newstart allowance but for the residency requirements for those payments as set out in the *Social Security Act 1991* (see subsection 13(17)).

**Section 14** provides additional eligibility requirements for ACCS (transition to work) for individuals who stopped receiving (within the meaning of subsections 23(2) and (4) of the *Social Security Act 1991*) a transition to work payment fewer than 12 weeks before the start of the CCS fortnight in which the session of care is provided. A transition to work payment is defined in subsection 85CK(3) of the Family Assistance Act.

Paragraphs 14(a), (b) and (c) outline three additional requirements that must be met in order for an individual to be eligible for ACCS (transition to work) for a session of care under subsection 85CK(2) of the Family Assistance Act, after the individual stopped receiving a transition to work payment.

**Section 15** sets out other types of payments that are taken to be ‘transition to work payments’ under subsection 85CK(3) of the Family Assistance Act (for the purposes of establishing eligibility for ACCS (transition to work)).

### **Part 3 – Amount of child care subsidy and additional child care subsidy**

#### *Division 1 – Hourly rate of child care subsidy*

Division 1 relates to the hourly rate of CCS. Working out the hourly rate of CCS is an important step towards determining the amount of CCS entitlement for the individual for the week, as mentioned in step 4 of the method statement in clause 1 of Schedule 2 to the Family Assistance Act.

**Section 16** provides the criteria for determining which types of service and the respective hourly rate caps which apply for a session of care provided by that type of service, as outlined in the table in subclause 2(3) of Schedule 2 of the Family Assistance Act.

Subsection 16(1) provides that unless subsections 16(2) or (3) apply, the type of service applicable to a session of care is the same type of service as specified in the notice of approval that the Secretary gives to a provider under subsection 194B(4) of the Family Assistance Administration Act, or as determined by the Secretary under subitem 9(2) of Schedule 4 to the Jobs for Families Act. In simple terms, this means that, where a provider applies for a particular service type to be approved, the sessions of care provided by that service generally attract the hourly rate cap as applicable to that same service type.

Subsection 16(2) sets out, however, that where a session of care is provided to a child who attends school by a service specified or determined as a centre-based day care service, that session is taken to be provided by an outside school hours care service for the purposes of determining the applicable CCS hourly rate cap.

Subsection 16(3) sets out that where a session of care is provided to a child who does not yet attend school by a service specified or determined as an outside school hours care service, that session is taken to be provided by a centre-based day care service for purposes determining the applicable CCS hourly rate cap.

Subsection 16(4) defines when a child is taken to ‘attend school’ for purposes of this section. A child attends school on a day that is the child’s first day of scheduled physical attendance at school or the day following that day, and where any of the following circumstances apply:

- (a) the child has turned six;
- (b) the child attends the year of school before grade one;
- (c) the child attends primary or secondary school;
- (d) the child is subject to home schooling as recognised in their State or Territory; or
- (e) the child would be attending school as referred to in paragraphs (b) or, (c) except that they are absent from school or are on holidays.

**Example:** If a child is scheduled to attend primary school but has not yet attended, and was provided care by a centre-based day care service, any session of care provided to the child on and following the child's first day of scheduled school attendance is taken to be provided by an outside school hours care service.

### *Division 2 – Circumstances for election*

Division 2 relates to working out the activity-tested amount of CCS.

**Section 17** prescribes that an individual may make a written election in relation to a CCS fortnight where a child is enrolled at more than one child care service during a week and the individual's activity test result, in relation to the child, is greater than zero. This election is used for the purposes of working out the activity-tested amount of CCS, which is mentioned in step 5 of the method statement in clause 1 of Schedule 2 to the Family Assistance Act. Under subparagraph 4(1)(a)(ii) of Schedule 2, the Secretary must have regard to an election made in this circumstance if satisfied that it is appropriate for the CCS fortnight.

### *Division 3 – Recognised activities*

The rules in Division 3 extend the definition of recognised activity in subclause 12(2) of Schedule 2 to the Family Assistance Act. That subclause already refers to activity undertaken in respect of paid work, approved courses of education or study, or training courses, as being forms of 'recognised activity'. The Minister's rules include other types of activities that an individual may engage in across a fortnight. Hours spent engaging in these additional forms of recognised activity will also count towards the individual's recognised activity result. The Minister's rules provide for new prescribed activities first, and then associated activities and finally, activities with variable hours of engagement. The Minister's rules also specify whether the individual may count the actual hours engaged in the recognised activity, or whether some other method applies. For instance, the hours spent engaging in some activities are subject to capping or deeming provisions which modify the number of hours that may be counted towards the individual's activity test result.

### **Subdivision A**

**Section 18** sets out that any activities prescribed in Division 3 of the Minister's rules are not recognised activities where the paid or unpaid work or other activity is undertaken for an unlawful purpose, or for an entity that has an unlawful purpose. This provision ensures that activities will not be recognised for the purposes of the CCS activity test if they are undertaken in connection with illegal activities such as working for a business that is undertaking illegal activities or for individuals participating in activities themselves that are against the law, such as selling illegal drugs.

## Subdivision B

Paragraph (12)(2)(d) of Schedule 2 to the Family Assistance Act allows the Minister to prescribe in rules any additional activities that are recognised activity for the purposes of working out an individual's recognised activity test result, as mentioned in subclause 12(1) of that Schedule. The Minister may also use such rules to prescribe how to work out a number of hours of recognised activity that is taken to be counted towards the activity in a fortnight, as well as a maximum number of hours that are to be counted towards the activity in a fortnight. This Subdivision prescribes those additional activities and how to work out the number of hours for these activities. Where an individual is a member of a couple, the activity test result, as worked out under clause 11 of Schedule 2, will be the lower of the result applicable to the individual and the result applicable to the partner of the individual. Hours of activity need not coincide with the hours the service provides care to the child of the individual.

**Section 19** prescribes that unpaid work experience or unpaid internships are a form of recognised activity, as long as this is not undertaken as part of either a training course or an approved course of education or study as mentioned in paragraphs 12(2)(b) or (c) of Schedule 2 to the Family Assistance Act.

*Example:* Portia, a mother of two, is undertaking an unpaid internship at a small law firm while her partner works full-time. Portia spends 60 hours per fortnight doing her internship and her partner works 75 hours per fortnight. They rely on care provided by an outside school hours care service to look after their children until they can collect them after work. Portia's 60 hours of activity are used to calculate the couple's entitlement as she has the lesser result. Portia's recognised activity test result would be 100 hours per fortnight.

**Section 20** prescribes that unpaid work in a family business is a form of recognised activity, as long as the family business is owned by a member of the individual's immediate family, which are set out in subsection (2).

**Section 21** prescribes that certain forms of voluntary work are recognised activity, as long as the voluntary work could reasonably be expected to improve work skills or employment prospects, or the work is for a charitable, welfare or community organisation, or the work directly supports the learning and development of children at a school, preschool or centre-based day care service. If the individual does not engage in any other form of recognised activity apart from voluntary work, then the individual's activity test result will be worked out by counting a maximum of 16 hours of activity. That is, if the individual was engaged in only voluntary work for a fortnight, the individual will be entitled to up to 36 hours of subsidised child care for that fortnight even if they are doing more than 16 hours of volunteering. If an individual also engages in at least one other form of recognised activity, with their voluntary work, the individual's activity test result is worked out by combining the hours for that activity with the actual total hours of voluntary work that the individual engages in.

Examples of charitable, welfare or community organisations mentioned in paragraph (1)(b) include:

- an entity registered under the *Australian Charities and Not for profits Commission Act 2012*;

- a religious body;
- a sporting club;
- an emergency management body (for example, a State Emergency Service or a Rural Fire Service).

Paragraph (1)(c) refers to voluntary work that encourages parental engagement and supports children's learning and development. An example is reading to children or providing support for other learning or development activities. However, activities such as participating on a parent and citizens association at a school are not included.

**Example 1:** Joanne volunteers at an animal shelter for 15 hours per week, and at the local church for one hour per week. The actual hours Joanne spends volunteering is 32 hours per fortnight. However, unpaid voluntary work is only recognised activity for up to 16 hours a fortnight, where the individual does not engage in any other form of recognised activity, Joanne's activity test result is therefore 36 hours of subsidised child care per fortnight (step 1), as unpaid voluntary work is currently her only recognised activity.

Joanne accepts some part-time work at her friend's pet washing business for four hours per fortnight. These four hours of paid work in combination with Joanne's 32 hours of voluntary work brings Joanne's total hours of activity to 36 hours per fortnight. As Joanne now engages in another form of recognised activity in addition to unpaid voluntary work, her 32 hours of voluntary work can be added to the four hours of paid work, to give Joanne an activity test result of 72 hours of subsidised child care per fortnight (step 2).

**Example 2:** Gaston and Genevieve have a seven year old daughter. Gaston works full-time but Genevieve is not currently working. Their daughter attends an outside school hours; care service twice a week when Genevieve visits her mother in a retirement home some distance away. Genevieve has been spending several hours per week teaching her daughter guitar. This activity is considered part of her normal parenting responsibilities. These hours do not count as hours of unpaid voluntary work for the CCS activity test.

At the school's request, Genevieve is now providing guitar lessons to many of the children at her daughter's school resulting in 20 hours per fortnight. In doing so, Adelaide's guitar lessons support children's learning at the school and are recognised as voluntary work for the CCS activity test. As unpaid voluntary work is her only activity, only the first 16 hours of her voluntary work are counted towards the recognised activity result, amounting to up to 36 hours of subsidised child care per fortnight (step 1).

**Example 3:** David and Najiyah have a seven year old daughter and a three year old son. Najiyah works full-time as a fashion consultant but David is not currently working. The school has asked for volunteers to help with reading and arts and crafts activities. David has volunteered and spends two sessions each week at the school for a total of 10 hours per fortnight. The access to 36 hours of subsidised child care per fortnight (step 1) supports the care for their son so that David can give his attention to reading and doing activities with the school children and to ensure Najiyah can continue to progress her career.

**Section 22** prescribes that actively looking for work is a form of recognised activity. Subsection (2) lists out the kinds of activities that are taken to be part of this recognised activity, such as preparing resumes and contacting potential employers. If the individual does not engage in any other form of recognised activity apart from actively looking for work, then the individual's activity test result will be worked out by counting a maximum of 16 hours of



activity. That is, if the individual was engaged in only looking for work for that fortnight, the individual will be entitled to up to 36 hours of subsidised child care for that fortnight even if they are doing more than 16 hours of this activity. If an individual also engages in at least one other form of recognised activity in addition to looking for work, the individual's activity test result is worked out by combining the hours for that activity with the actual total hours spent actively looking for work.

**Example 1:** Tomoko is looking for work, but does not receive Newstart Allowance or other income support payments as she does not meet the income and assets test. Her three year old daughter attends a centre-based day care service once a week. Tomoko spends 34 hours per fortnight searching and applying for jobs and attending interviews. Although Tomoko is actively looking for work for 34 hours per fortnight, this is her only recognised activity. Actively looking for work, when undertaken by its self, is limited to 36 hours of subsidised child care per fortnight (step 1). Tomoko would need to combine actively looking for work with one or more of the other recognised activities to receive further hours of subsidised child care.

**Example 2:** Britannicus and Mia have a three year old son who attends a centre-based day care service. Mia works full-time (38 hours per week) while Britannicus works casual shifts in his friend's comic book store. Britannicus works around 15 hours per week at the comic book store and spends another five hours per week actively looking for full-time employment. The couple's combined income means that Britannicus is not eligible for an income support payment.

Either partner's CCS entitlement is based on the lower of the couple's activity result, which is Britannicus' 40 hours per fortnight. They are therefore entitled to 72 hours of subsidised child care per fortnight (step 2).

**Section 23** prescribes that actively setting up a business is a form of recognised activity. The activity is only recognised in respect of businesses that are not yet operating, as this assistance is only designed for individuals engaged in the preparatory stages as opposed to those with established businesses. An individual's activity test result applies on a fortnightly basis, and is taken into account in making weekly payment determinations under section 67CD of the Family Assistance Administration Act. The activity will only be recognised for weekly determinations of entitlement made across a maximum period of 13 CCS fortnights (equivalent to six months) in a 12 month period, but those fortnights do not need to occur consecutively, or in relation to the same business.

**Example 1:** Tom has left his job as a baker and begun setting up a new business selling artisan confectionary. Tom's wife, Sarah-Jane, is a journalist who works 80 hours per fortnight. The couple's young son attends a centre-based day care services. Tom's time spent attending confectionary conventions, pitching his idea to potential investors, organising his online store and marketing plan, and arranging his financial infrastructure all count towards his hours of activity. Tom's total activity per fortnight is 45 hours, making his the lower result, as compared to his wife's result. The family's activity test result is therefore up to 72 hours of subsidised child care per fortnight (step 2).

As actively setting up a business is time limited to six months (i.e. 13 CCS fortnights), once every 12 months, any activity Tom undertakes relating to setting up his business will not be recognised activity once the result has contributed to Tom and his wife being entitled to subsidised child care for 13 CCS fortnights. Tom would need to undertake another recognised activity to remain entitled to CCS. The time Tom spends setting up a business does not have to be reported consecutively. For instance, after 4 weeks of setting up his business Tom might put his plans for the business on hold to work on a 12 week contract for someone else. When Tom resumes his work in setting up the business he would still be able to report his hours as recognised activity for a further 5 CCS fortnights. If Tom does not commence his business after completing six months of setting up and does not undertake any other form of recognised activity after this period, Tom and

his wife, would not be entitled to any subsidised hours of child care. If Tom's business begins to operate he will be able to report his hours of business activity as paid work (self-employed).

## **Subdivision C**

Subclause 12(3) of Schedule 2 to the Family Assistance Act allows the Minister to prescribe additional activities associated with a form of recognised activity that the individual is engaged in, as well as prescribing types of leave, breaks or other circumstances where the individual is not performing recognised activity, such that the individual can be taken to be engaged in that recognised activity.

**Section 24** extends the recognised activity of paid work in paragraph 12(2)(a) of Schedule 2 to the Family Assistance Act, to include the CCS fortnight that includes the actual start date of an individual's employment, and to also include the CCS fortnight prior to CCS fortnight that includes the actual start date of an individual's employment, as a period during which the individual will be taken to engage in the same number of hours as the number of hours of paid work the individual will undertake once they start working. This period is intended to allow parents time to arrange for appropriate child care arrangements prior to entering the workforce. The rule also covers individuals who are already engaged in paid work, but will be increasing their hours of paid work, to ensure such individuals will have a higher activity test result if they qualify for it from the fortnight prior to the increase in hours.

**Section 25** extends the recognised activity of paid work, to also include periods of paid and unpaid leave, taken in prescribed circumstances, such that the individual is treated as engaging in recognised activity for the same number of hours, during that leave. For unpaid leave, the rule applies for a maximum period of 6 months, unless the leave is of the nature of parental leave, in which case no time limit applies. The rule clarifies that if the individual is an employee or a contractor, leave must be granted under the terms or conditions of employment. The terms or conditions of employment include the minimum leave entitlements which apply to employees under the National Employment Standards (as published by the Fair Work Commission, and which in 2017 could be viewed at <https://www.fairwork.gov.au/employee-entitlements/national-employment-standards>), awards, registered agreements and employment contracts. For all other individuals, such as self-employed individuals, the leave must be of a nature of one of the types of leave which would ordinarily be available to an employee or a contractor, as set out in paragraph (4)(b). The rule only applies to individuals who are normally engaging in at least 8 hours of paid work each fortnight. Where the rule applies, the individual is taken to be engaged in the same number of hours of paid work normally engaged in by the individual during a period of the leave.

**Section 26** extends the recognised activity of a training course, to also include hours of self-directed study in relation to the course that the individual engages in over and above the scheduled hours (for example lectures and tutorials) of the course. The individual is therefore able to count the total hours spent on achieving the qualification for the purposes of working out their activity test result. A note to the rule clarifies that a different rule (section 27) exists specifically in relation to breaks during the course.

**Section 27** extends the recognised activity of a training course, to also include scheduled semester or vacation breaks during the training course. Where the rule applies, the individual is taken to be engaged in the same number of hours of that training course normally scheduled during a period of the same length. However, the individual is not taken to be

engaging in recognised activity under this rule where the break occurs at the start (is enrolled but has not actually commenced) or end (has completed but has not yet been conferred with the relevant award) of a course or arises because the individual defers starting or continuing such a course

**Section 28** extends the recognised activity of an approved course of education or study, to also include hours of self-directed study in relation to the course that the individual engages in over and above the scheduled hours (for example lectures and tutorials) of the course. The individual is therefore able to count the total hours spent on achieving the qualification for the purposes of working out their recognised activity result. A note to the rule clarifies that a different rule (section 29) exists specifically in relation to breaks during the course.

**Section 29** extends the recognised activity of an approved course of education or study, to also include scheduled semester or vacation breaks during the training course. Where the rule applies, the individual is taken to be engaged in the same number of hours of that course normally scheduled during a period of the same length. However, the individual is not taken to be engaging in recognised activity under this rule where the break occurs at the start (is enrolled but has not actually commenced) or end (has completed but has not yet been conferred with the relevant award) of a course or arises because the individual defers starting or continuing such a course.

#### **Subdivision D**

Subclause 12(4) of Schedule 2 to the Family Assistance Act allows the Minister to prescribe methods of working out the number of hours of recognised activity an individual is taken to be engaged in a specific form of recognised activity, as well as prescribing a maximum number of hours to be counted towards the activity in that fortnight, for the purposes of working out the recognised activity result for an individual.

**Section 30** sets out a method for working out the number of hours of recognised activity for an individual who engages in paid work under work arrangements where the number of work varies across fortnights and does not follow a predictable pattern. The method allows for a process of reasonable estimation of hours of paid work based on the hours the individual may engage in over the next period of 6 CCS fortnights. The individual is to estimate the largest number of hours of paid work (including under several variable work arrangements) that the individual is likely to engage in during at least one CCS fortnight (that is, their most active CCS fortnight) during that period. For each CCS fortnight during that period, the individual is taken to be engaged in the same number of hours of paid work that the individual estimates they will be engaged in during the most active CCS fortnight. The rule applies for each CCS fortnight until the individual's circumstances change such that the individual is no longer engaged in variable work arrangements, or the variable work arrangement changes significantly such that the estimate is no longer reasonable in respect of the next period of 6 CCS fortnights. The individual must notify the Secretary of a new reasonable estimate (if relevant) or the fact that the individual has ceased the variable work arrangements. The rule is not expected to be needed by fly-in fly-out, seasonal, contract, and shift workers with a consistent number of fortnightly hours, as these are covered by other recognised activities. Where the Secretary becomes aware that the estimate provided by the individual was not reasonable, the rule will not apply to the individual, and the Secretary may review earlier decisions which were based on the unreasonable estimate.

**Example 1:** Suzie is a single parent working at a supermarket. Her hours per week can vary from 7.5 (1 shift) to 22.5 (3 shifts). Occasionally she can also be called into work at short notice for extra shifts if they are short staffed on the day.

Suzie's working hours across six fortnights range from 15 hours to 45 hours per fortnight which would ordinarily give her an activity test result of either 36 hours of subsidised child care per fortnight (step 1 of the activity test) or 72 hours of subsidised child care per fortnight (step 2 of the activity test) depending on the hours she worked in that fortnight.

However, to support her maximum hours of paid work during a fortnight with access to sufficient hours of subsidised child care, Suzie would declare an estimate of 45 hours per fortnight and would be entitled to 72 hours of subsidised child care per fortnight (step 2 of the activity test) based on this estimate over six fortnights as this is the maximum number of hours she would be entitled to according to the level of activity estimated for a single fortnight in that period.

**Example 2:** Milli works two casual jobs in the fast food industry. Her total hours can vary significantly across fortnights – in some fortnights she is only assigned one 4 hour shift, while in others she can be assigned up to five 4 hour shifts.

Milli's working hours across six fortnights range from 4 hours to 20 hours per fortnight which would ordinarily give her entitlement ranging from zero to up to 72 hours of subsidised child care per fortnight (step 2) depending on hours worked each fortnight.

To support her maximum hours of paid work during a fortnight with access to sufficient hours of child care, Milli would declare an estimate of 20 hours of paid work per fortnight and would be entitled to 72 hours of subsidised child care in each fortnight (step 2 of the activity test).

#### *Division 4 – Minister's rules result*

Division 4 prescribes a Minister's rules result, or a method for working out such a result, by reference to the circumstances of the individual, the individual's partner or the child. The rules in this Division may effectively grant certain individuals an exemption from activity test requirements, or a certain result in particular circumstances that are not necessarily associated with their actual level of activity.

In this Division, with the exception of section 35, the reference to an 'individual' receiving a result can be read as a reference to either an eligible individual, or any partner of the individual. This has the effect that the result may apply for either member of a couple (or both, if the eligible individual and partner can separately establish that they meet the prescribed circumstances). The key policy objective is to ensure that couples are not unfairly disadvantaged in the prescribed circumstances, due to a lower result of a partner that may otherwise apply in the absence of a Minister's rules result (and which would adversely affect the activity test result of the eligible individual under paragraph 11(1)(b) of Schedule 2 to the Family Assistance Act). Further, in this Division, with the exception of section 40, a result will apply in relation to any child the individual may be eligible in respect of.

**Section 31** sets out the scope of the Division, which is to prescribe rules for the purposes of clause 14 of Schedule 2 to the Family Assistance Act.

**Section 32** prescribes a result of 100 for an individual for a CCS fortnight, if, on the first day of the fortnight, the individual meets the definition of a disabled person in subsection 3(1) of the Family Assistance Act, and due to that disability or impairment, the individual is unable to engage in recognised activity to any significant degree, or would be unable to properly care for the child if sessions of care by a child care service were not provided.

**Example:** Osagie is a single father receiving the Disability Support Pension (DSP) and his daughter attends FDC. Recipients of DSP are exempt from the CCS activity test due to their disability. Osagie is entitled to Step 3 of the activity test - 100 hours of subsidised child care per fortnight, irrespective of whether he undertakes or is able to undertake any recognised activity.

**Section 33** prescribes a result of 100 for an individual for a CCS fortnight, if, on the first day of the fortnight, the individual is temporarily absent from Australia. A note to the rule clarifies that, despite any such result, the eligible individual who is overseas may still cease to be eligible for child care subsidy in circumstances set out by section 85EE of the Family Assistance Act (generally, after six weeks).

**Example:** Susan is a single parent. She is visiting the United States of America (US) for five weeks to visit her mother. Susan did not want to take her seven year old daughter out of school, so she has left her in the care of her sister who will maintain the child's routine of school followed by outside school hours care. Prior to leaving to visit her mother, Susan was engaged in part-time paid work for 30 hours per fortnight and entitled to Step 2 of the activity test - 72 hours of subsidised child care per fortnight.

Although Susan is not undertaking any recognised activity while she is visiting her mother, she is exempt from the activity test due to being outside of Australia. During this period, Susan is entitled to Step 3 of the activity test - 100 hours of subsidised child care per fortnight.

Susan decides to stay in the US for an additional three weeks to help her mother move house, which extends her total time overseas to eight weeks. Susan loses her CCS eligibility for sessions of care provided in the last fortnight of her trip by remaining outside Australia for over six weeks due to the operation of section 85EE of the Family Assistance Act. She would only have been entitled to 100 hours of subsidised child care for that fortnight if she remained otherwise eligible.

**Section 34** prescribes a result of 100 for an individual for a CCS fortnight, if, on the first day of the fortnight, the individual is in gaol or psychiatric confinement.

**Example:** Theo works part-time as a cleaner for 14 hours per fortnight and his wife Anja is in prison. They have three children and the youngest attends a centre-based day care service once a week. As Anja is unable to participate in a recognised activity or be at home with their three children she is exempt from the activity test with her activity test result being Step 3 of the activity test - 100 hours of subsidised child care per fortnight.

In two parent families, the parent with the lowest activity levels will determine the hours of subsidised care for the child. In this case, although Anja is exempt, her husband Theo is not. Theo works 14 hours per fortnight, and his activity test result is therefore 36 hours (step 1 of the activity test). The activity test result is the lower of the couple's activity test results, in this case Theo's. The family would be entitled to Step 1 of the activity test - 36 hours of subsidised child care per fortnight.

If Theo were to increase his hours of cleaning to more than 16 hours per fortnight it would bring him (and the family) to the next step of the activity test and the family would be entitled to Step 2 of the activity test – 72 hours of subsidised child care per fortnight.

**Section 35** prescribes a result of 100 for individuals and any partner of the individual where either the individual *or* the partner of the individual would have been eligible for ACCS (grandparent) for the child, except for failing to meet the requirement in paragraph 85CJ(1)(d) of the Family Assistance Act of being in receipt of a social security or veterans' pension or benefit of a specified kind. The result will apply automatically to both the individual and any partner, as long as *either* the individual or the partner of the individual can demonstrate that she or he meets this circumstance. This is unlike the other results prescribed

in this Division, which can only apply to both members of a couple if the individual *and* any partner separately meet the circumstances.

**Example 1:** Akash and Kyra are the legal guardians of their two young grandchildren following the death of the children's parents. As they are both elderly they rely on a centre-based day care service to provide some relief from the physical demands of caring for young children. The couple are self-funded retirees and not eligible for income support. When Akash makes his claim for CCS he also submits a copy of the court order providing them with full-time custody of their grandchildren. As Akash is the principal carer of their grandchildren, both he and his partner, Kyra, are exempt from the CCS activity test and, assuming all other eligibility criteria are met, is entitled to Step 3 of the activity test - 100 hours of subsidised child care per fortnight.

**Example 2:** David and Genie are the full-time carers of their two grandchildren and both rely on the aged pension. Principal carer grandparents in receipt of income support are entitled to ACCS (grandparent), exempt from the CCS activity test and entitled to Step 3 of the activity test – 100 hours of subsidised child care per fortnight. Although they have an informal parenting agreement, Genie is able to submit a statutory declaration along with her ACCS (grandparent) application to prove she cares for their grandchildren full-time, and has substantial autonomy for decisions et cetera.

Genie's sister passes away, leaving the family a large sum of money in her will. As a result, the family no longer meet the income and assets test to be eligible for income support and as such, Genie is no longer entitled to the ACCS (grandparent) payment. However, as principal carer of their grandchildren Genie (and therefore, David) are both exempt from the CCS activity test and entitled to Step 3 of the activity test – 100 hours of subsidised child care per fortnight, which she will receive at the rate that corresponds with her applicable percentage based on estimated adjusted taxable income (and actual adjusted taxable income post-reconciliation).

**Example 3:** Dale and Hannah's daughter, and their daughter's husband have died in a tragic car accident. The accident has left them with custody of their son in law's four year old daughter from a previous marriage. They think of the child as their biological grandchild and are happy with the arrangement but rely on centre-based day care to provide some relief from the physical demands of looking after a young child. Both Dale and Hannah are still working part-time and not receiving an income support payment. Dale decides to claim for CCS to assist them with their child care fees. Along with his claim, Dale submits a copy of the court order which states his relationship with the child and confirms he is the child's principal carer – providing more than 65 per cent of ongoing daily care and having substantial autonomy for decisions et cetera. His application is accepted and Dale and Hannah are exempt from the activity test and entitled to Step 3 - 100 hours of subsidised child care per fortnight, at a rate corresponding with his applicable percentage based on estimated adjusted taxable income (and actual adjusted taxable income post-reconciliation).

**Section 36** prescribes a result of 100 for an individual for a CCS fortnight, if, on the first day of the fortnight, the individual receives a carer payment under the *Social Security Act 1991*.

**Example 1:** Betty is a full time carer, providing constant care for her mother who has early onset dementia. Betty places her young daughter in centre-based day care three days per week to enable her to meet her caring responsibilities. As a full time carer, Betty is in receipt of Carer Payment and exempt from the CCS activity test with the activity test result of Step 3 - 100 hours of subsidised child care per fortnight. Betty's husband David is also at home during the day; however, David has a back injury which prevents him from working. David receives the DSP and is also exempt from the CCS activity test due to section 31 of the Minister's rules (individuals with disabilities or impairments). The family is entitled to Step 3 of the activity test – 100 hours of subsidised child care per fortnight.

**Example 2:** Daniel has been caring for his wife who has multiple sclerosis. His wife receives DSP and is exempt from the CCS activity test with a result of Step 3 – 100 hours of subsidised child care per fortnight. Daniel relies on FDC to care for his son, while Daniel cares for his wife

40 hours per fortnight. Daniel has been receiving Carer Allowance with an automatic result of Step 2 of the activity test - 72 hours of subsidised child care per fortnight. The family is entitled to Step 2 of the activity test, as the result is based on the lower of the couple's activity test results.

Daniel's wife's condition is worsening and caring for her has now become a full-time commitment, routinely exceeding 80 hours per fortnight. His wife's caring requirements are reassessed and Daniel is now entitled to Carer Payment as he is providing constant care. He is exempt from the CCS activity test and entitled to Step 3 of the activity test - 100 hours of subsidised child care per fortnight. As his wife is also exempt, the family is entitled to Step 3 of the activity test – 100 hours of subsidised child care.

**Section 37** prescribes a result of 100 for an individual for a CCS fortnight, if, on the first day of the fortnight, the individual is providing constant care to another individual, and would qualify for a carer payment under the *Social Security Act 1991*, except for not meeting any income or asset test requirements under Part 2.5 of that Act.

**Example:** Maria, a single parent, is providing constant care for her disabled adult sister in the home their parents left to them. Her sister receives the DSP. Maria relies on child care for her young daughter in order to meet the significant demands of caring for her sister. Maria's parents left the family their savings and some investments, and because of this, Maria does not meet the income and assets tests to receive Carer Payment. Maria has also not applied for Carer Allowance, choosing instead to rely on the modest income provided by the interest on the savings and investments. Maria is exempt from the CCS activity test as she is providing constant care to her sister, and entitled to Step 3 of the activity test – 100 hours of subsidised child care per fortnight.

**Section 38** prescribes a result of 72 for an individual for a CCS fortnight, if, on the first day of the fortnight, the individual receives a carer allowance under the *Social Security Act 1991*. However, where the individual is also engaged in recognised activity that would otherwise count towards the individual's recognised activity result (including because of Division 3 of the Minister's Rules), the individual's Minister's rules result is the higher of 72, and any result worked out by adding the number of hours of such recognised activity to the actual number of hours of caring activity the individual undertakes to qualify for the allowance. The section does not apply if the individual otherwise receives a result under section 36 (individual receiving a carer payment) or section 37 (individual providing constant care) in relation to the fortnight.

**Example 1:** Geoffrey and Enwezor are the parents of twins attending primary school and also attending an outside schools hours care (OSHC) service. Enwezor receives the Disability Support Pension and is therefore exempt from the CCS activity test. Geoffrey spends 40 hours per fortnight caring for Enwezor and is in receipt of Carer Allowance.

In addition to his caring responsibilities Geoffrey works part-time for 30 hours per fortnight. As Enwezor is exempt from the activity test, it is Geoffrey's activity that determines the family's CCS entitlement. Geoffrey's total of 70 hours per fortnight of recognised activity entitles the family to Step 3 of the activity test - 100 hours of subsidised child care per fortnight.

**Example 2:** Siobhan is a single mother with a three year old daughter in centre-based day care service. She works part-time for 40 hours per fortnight in a local restaurant and is also in receipt of Carer Allowance as she spends 40 hours per fortnight caring for her disabled brother Enzo. Siobhan's combined total of 80 hours of recognised activity plus caring activity per fortnight entitles her to Step 3 of the activity test - 100 hours of subsidised child carer per fortnight.

**Example 3:** Ashley is a single mother with a two year old daughter who attends a centre-based day care service. Ashley lives with her mother, who is ill, and spends around 45 hours per fortnight caring for her. Ashley also volunteers for 10 hours per fortnight at her daughter's centre-based day care service. Ashley engages in a total of 55 hours of recognised activity plus caring

activity per fortnight, and so she is entitled to Step 3 – 100 hours of subsidised care. However, if Ashley only cared for her mother for 15 hours per fortnight, and volunteered for 20 hours per fortnight then she would only be taken to engage in a total of 31 hours per fortnight (15 hours of caring activity plus 16 hours of recognised activity) as, under section 22 of the Minister’s rules, a maximum of 16 hours can be counted for recognised activity if the individual’s only other activity is voluntary work. Ashley is entitled to Step 3 – 72 hours of subsidised care.

**Section 39** prescribes different results, including methods to calculate a result, for individuals in receipt of certain social security payments under the *Social Security Act 1991*, depending on the particular circumstances of the individual. The payments are listed in subsection (2) and include the parenting payment, youth allowance, newstart allowance and a special benefit (but only if the individual would qualify for one of the other benefits but for a residence requirement).

A result of 36 applies for an individual for a CCS fortnight, if, on the first day of the fortnight, the individual receives a benefit under the *Social Security Act 1991* and is either subject to participation requirements under that Act, or exempt from those requirements. However, where the individual is also engaged in recognised activity that would otherwise count towards the individual’s recognised activity result (including because of Division 3 of the Minister’s Rules), the individual’s Minister’s rules result is the higher of 36, and any result worked out by adding the number of hours of such recognised activity to the actual number of hours of activity the individual engages to qualify for the relevant benefit during the fortnight. Where there is an overlap, and an activity meets the definition of both qualifying activities and recognised activities, the activity is taken to be a qualifying activity instead and hours are counted accordingly.

A result of 100 applies to individuals who are exempt under the *Social Security Act 1991* from the requirement to engage in qualifying activities, unless the exemption is because the individuals is a home educator or a distance educator, or due to the number of children supported by the individual. The note clarifies which provisions in the *Social Security Act 1991* relate to these grounds.

**Example 1:** Pradeep is a single parent caring for his 4 year old son and receiving Parenting Payment. Due to the age of his child Pradeep has minimal mutual obligation requirements which he meets by participating in ParentsNext activities for eight hours per fortnight. Under this rule, he is entitled to 36 hours of subsidised child care per fortnight (Step 1 of the activity test).

Pradeep volunteers for 8 hours per week to do the accounts and other administrative work for a national children’s charity. This 16 hours per fortnight of voluntary work added to the 8 hours he participates in ParentsNext activities means Pradeep is participating in 24 hours of recognised activity plus qualifying activity a fortnight. This means Pradeep is entitled to 72 hours of subsidised child care per fortnight (Step 2 of the activity test).

**Example 2:** Fran is a single parent and has a seven year old child who attends outside school hours care. She receives Newstart Allowance and has a part-time participation requirement of 30 hours per fortnight. As Fran has declared she is participating in 30 hours of recognised activity per fortnight, she is entitled to 72 hours of subsidised child care per fortnight -Step 2 of the activity test.

Fran was recently in a car accident and now has a temporary medical condition that exempts her from Newstart mutual obligation requirements. As such, Fran is now entitled to 100 hours of subsidised child care per fortnight (Step 3 of the activity test). Once she is no longer exempt from the mutual obligation requirements, her CCS entitlement will be based on her activity. If she



resumes her previous level of activity to meet her part-time participation requirement, she will be entitled to 72 hours of subsidised child care per fortnight (Step 2 of the activity test).

**Example 3:** Margaret, a mother of two, is in receipt of Newstart Allowance and has a part-time participation requirement which requires her to be looking for or undertaking suitable paid part-time work of at least 30 hours per fortnight. Margaret is currently spending 8 hours per fortnight approaching employers, writing applications and attending job interviews.

Margaret has found 20 hours per fortnight of part-time work and is hoping to increase this as her children grow older. Margaret also volunteers at her children's school assisting with reading groups for five hours per fortnight (this activity is not in her participation plan for Newstart Allowance) and she still spends 8 hours per fortnight undertaking jobseeking activities. Margaret's total combined activity is 33 hours per fortnight. Margaret's partner who is in receipt of Youth Allowance (student) meets his mutual obligation requirements by studying full-time for 80 hours per fortnight.

The family's CCS entitlement is based on the lower of the couple's activity test result, which is Margaret's 33 hours per fortnight. The family is entitled to 72 hours of subsidised care per fortnight (Step 2 of the activity test).

**Section 40** prescribes a result of 36 for an individual for a CCS fortnight, if, at any time during the fortnight, the child attends an early educational program at a centre-based day care service. The result only applies for the individual in relation to a particular child, that is, the child attending the program and only where the program is provided by a service approved for the purposes of the family assistance law as a centre-based day care service. That is, the service cannot be one that primarily provides an early educational program, such as a preschool or kindergarten, as such a service cannot be approved for the purposes of the family assistance law (see subparagraph 194D(a)(vi) of the Family Assistance Administration Act).

**Example 1:** Darrin and Kath have two young children, John who is four and Etta who is three. Darrin works full time and Kath is a stay at home mother. As Kath is not participating in a recognised activity the family's activity test result would be zero as activity is worked out from the lower of the couple's results. However, as the family's combined annual income is less than the low income threshold of around \$65,000 (in 2017 terms) they are entitled to the low income result of 24 hours of subsidised child care per fortnight under the child care Safety Net.

A new year begins and it is now the year before John is to start full-time school. To support John's attendance at a preschool program at a centre-based day care service in the year before he starts full-time school, the family is entitled to 36 hours of subsidised child care per fortnight for the duration of the year.

For John's younger sister Etta, the couple is still only entitled to 24 hours of subsidised child care per fortnight under the child care Safety Net.

**Example 2:** Richard and Chelsea have twin sons, both who have recently turned five. They would like the boys to attend preschool as they have been enrolled at the local primary school for next year.

Richard works full time and Chelsea is a stay at home mother, not participating in a recognised activity meaning the family does not meet the activity test as entitlement is worked out by the lowest of both parent's activity test result. As the family's combined annual income is over \$100,000 they are also not entitled to the low income activity test result under the Child Care Safety Net.

However, now the boys are in the year before commencing full-time school, the family is entitled to this exemption as the boys will attend a preschool program at a centre-based day care service. As such, the family is entitled to 36 hours of subsidised child care for each of the boys to access the preschool program at the service for the duration of the year.

## **Part 4 – Approval of providers of child care services**

### *Division 1 – Application for approval*

Division 1 contains additional requirements for providers making an application for approval for the purposes of the family assistance law.

**Section 41** prescribes that applications made for the purposes of the family assistance law as in force before 2 July 2018, are taken not to have been made if the application is made on or after 1 April 2018. The rule is intended to reduce the number of applications that can be made in the period immediately prior to the commencement of the CCS. The rule will also enable the department to focus on transitioning already approved operators, and individual CCB claimants, to the new CCS, without having to process applications made in respect of the law to be imminently repealed. However, the Secretary can make a case by case determination to accept an application that would otherwise be taken not to be made, if exceptional circumstances exist.

**Section 42** supplements section 194A Family Assistance Administration Act by prescribing additional entities or bodies that may apply to be approved for the purposes of the family assistance law in respect of a child care service that the provider operates (or intends to operate). Under section 194A, an individual, a body corporate or a partnership may apply for approval. These entities are also able to apply under the applicable State or Territory legislation dealing with the regulation of education and care services, being the Education and Care Services National Law and Regulation (the National Law). However, there are a select few entities and bodies that are eligible to apply under the National Law that are not of a type listed in section 194A. To ensure consistency, paragraph 42(a) aligns the Family Assistance Administration Act with the National Law, to allow those specific entities to also apply for approval under section 194A of the Family Assistance Administration Act.

Paragraph 42(b) also extends section 194A by allowing unincorporated entities to apply, where those entities have a governing body and section 230B of the Family Assistance Administration Act can be taken to apply to them. Among other things, this may allow some providers to apply in respect of a child care service if, on 30 June 2018 the provider was in receipt of funding for that service under the Budget Based Funded program administered by the department. Many of these services are currently unincorporated and not approved for the purposes of the family assistance law as in force before the commencement day, but may have a governing body such that obligations, permissions and offences under the family assistance law can be applied under section 230B to each member of the entity or body's governing body.

The section only applies where the entity or body is not already of a type listed in paragraphs 194A(1)(a)-(c) of the Family Assistance Administration Act (an individual, a body corporate, or a partnership).

### *Division 2 – Provider eligibility rules*

Division 2 contains additional provider eligibility rules to those under section 194C of the Family Assistance Administration Act, which a provider must meet in order for a provider to be approved in respect of a child care service in accordance with section 194B of the Family Assistance Administration Act. Continuing to satisfy the eligibility rules (including as set out in this Division) is also a condition for continued approval of an approved provider under section 195A of the Family Assistance Administration Act.

**Section 43** prescribes additional criteria that must be satisfied by a provider as part of the provider eligibility rules in section 194C of the Family Assistance Administration Act.

Subsection 43(2) requires the provider to perform the checks as specified under the provision and be able to provide a written record of such checks upon request, for each person with management or control (other than a person who is responsible for the day-to-day operation of the service). The specified checks are a national police check, a working with children card check, a National Personal Insolvency Index check, and a Current and Historical personal name extract search, to be obtained from the relevant authority or agency.

Subsection 43(3) requires the provider to perform the checks as specified under the provision and be able to provide a written record of such checks upon request, for each person responsible for the day-to-day operation of the service. The specified checks are a national police check and a working with children card check, to be obtained from the relevant authority or agency.

Subsection 43(4) requires the provider to perform the checks as specified under the provision and be able to provide a written record of such checks upon request, for each educator in respect of an FDC service (as defined in section 5 of the National Law). The specified checks are national police check and a working with children card check, to be obtained from the relevant authority or agency.

### *Division 3 – Service eligibility rules*

Division 3 contains service eligibility rules in addition to those under section 194D of the Family Assistance Administration Act, which must be met for a provider to be approved in respect of the child care service in accordance with section 194B of the Family Assistance Administration Act. Providers must continue to satisfy these eligibility rules (including as set out in this Division) once approved (if not, the Secretary may impose a sanction, including by cancelling approval).

**Section 44** prescribes additional matters in relation to family day care (FDC) educators (as defined in section 4 of the Minister's rules) that the Secretary must have regard to when considering whether it is appropriate for the provider to be approved in respect of a service, in accordance with paragraph 194D(f) of the Family Assistance Administration Act. In particular, the Secretary must take into consideration any act of an FDC educator involving fraud or dishonesty, and an FDC educator's arrangements to ensure compliance with the family assistance law, including by anyone the educator is responsible for managing. The additional matters only apply where the FDC educator is not already subject to such considerations under sections 194C or 194D of the Family Assistance Administration Act (because the FDC educator is the provider, a person with management and control, or a person with day-to-day control of a child care service and therefore those matters are considered in assessing whether that person is a 'fit and proper' person under section 194E of the Family Assistance Administration Act).

**Section 45** prescribes additional criteria in accordance with paragraph 194D(g) of the Family Assistance Administration Act, which form part of the service eligibility rules that a service must satisfy in order for a provider to be approved in respect of that service.

Subsection 45(2) applies to providers applying for approval in respect of a centre-based day care service. The service must: be approved as a centre-based day care service under the National Law; or be licensed or registered to operate as an occasional care service under State or Territory law; or be a service in respect of which a provider is not required to meet State/Territory requirements, under section 50 of the Minister's rules.

The service must also not operate primarily as an outside school hours care service including by providing care to a majority of children who attend school, within the meaning of section 4 of the Minister's rules.

Subsection 45(3) applies to providers applying for approval in respect of an outside school hours care service. The service must be approved as a centre-based day care service under the National Law, and primarily provide care outside normal school hours to children who attend school, within the meaning of section 4 of the Minister's rules.

Subsection 45(4) applies to providers applying for approval in respect of a FDC service, where the service must be approved as such under the National Law, or be a service in respect of which a provider is not required to meet State/Territory requirements, under section 50 of the Minister's rules.

### *Division 3 – Fit and proper person considerations*

Division 3 relates to the fit and proper person considerations that are relevant to determining whether a provider and a service satisfy the provider eligibility rules and service eligibility rules respectively, in order for a provider in respect of a service to be approved, and remain approved.

**Section 46** prescribes additional matters that the Secretary must have regard to in determining whether a person is a fit and proper person for the purposes of paragraphs 194C(b), (c) or (d) or 194D(c) or (d) of the Family Assistance Administration Act, in particular involving the provider or a person with management or control (within the meaning of section 194F of the Family Assistance Administration Act).

Subsection 46(2) requires the Secretary to have regard to the experience and expertise of the provider or any person with management or control in the provision of child care services. The Secretary will confirm whether the applicant has National Law approval before it can grant approval under the family assistance law.

Subsection 46(3) requires the Secretary to have regard to whether or not the provider or person with management or control, can effectively demonstrate a sufficient understanding of, and commitment to complying with, the obligations that would apply under the family assistance law, if approval is granted. This allows for a delegate to take account of lacking or only rudimentary understanding of obligations under the family assistance law, or a lack of commitment to complying with relevant obligations, when assessing a new application for approval or ongoing fitness and propriety. Approved providers are required to correctly manage substantial Commonwealth funds and satisfy compliance obligations, and it is critical

that providers and relevant people are able to demonstrate understanding of their obligations, and are committed to complying with them.

Subsection 46(4) requires the Secretary to have regard to whether the provider or any person with management or control owns, operates, controls or carries out a Registered Training Organisation (RTO), and whether any educator (whether or not the person is employed by the provider of the service) has obtained any qualifications in respect of providing child care from the same RTO in circumstances that might reasonably be perceived as a conflict of interest.

Subsection 46(5) requires the Secretary to have regard to whether the provider or any person with management or control owns, operates, controls or carries out any other business in circumstances that might reasonably be perceived as a conflict of interest, or where the interest will compromise the provider or person's ability to comply with obligations under the family assistance law, or where approval will benefit the other business.

#### *Division 5 – Conditions for continued approval*

Division 5 prescribes additional conditions that, under section 195E of the Family Assistance Administration Act, an approved provider must comply with in respect of the provider or an approved child care service of the provider.

**Section 47** provides that it is a condition for continued approval that the provider of an approved FDC service ensures that an FDC educator is providing care to less than 50 per cent of children who are related to the FDC educator as a niece or nephew, or a cousin or a grandchild or great-grandchild. The intent of this is to ensure that educators of FDC services provide care to a range of children, and not solely or predominantly to relatives. While it is permissible for educators to provide care to cousins, nieces/nephews or grandchildren/great grandchildren, this must only be where the care is provided as part of a broader care setting whereby care is predominantly provided to children who are not related. This provision works in conjunction with the rule subsection 8(3) which ensures that CCS is not payable for a FDC service provided by educators to other classes of relatives.

**Section 48** provides it is a condition for continued approval that an approved child care service continues to be operated by the approved provider who applied for approval of that service under section 194A of the Family Assistance Administration Act, or was taken to be the approved provider on the commencement day. A provider must also continue to operate as the same entity or body identified in the application seeking approval. For instance, where approval was granted to a partnership in respect of a child care service but a business decision is made by the partnership to transfer the operation and ownership of the service to a company, then, the approved provider, the partnership, no longer exists and the new provider, the company, must apply for separate approval.

The service must continue to operate as the same type of service that is either specified in the notice of approval or as determined by the Secretary under subitem 9(2) of Schedule 4 of the Jobs for Families Act.

**Section 49** sets out conditions of continued approval for providers in respect of a service referred to in section 50. The intent of this provision is to ensure that such providers, who are not required to meet State/Territory requirement are still required to maintain particular standards for the purposes of approval under the family assistance law. The intent of this

condition is to ensure that services which are not required to meet State/Territory requirements are regulated to ensure the quality of care and safety of children. An example of this type of service is a service formerly funded under the Commonwealth Budget Based Funded (BBF) program.

Subsection 49(2) requires a provider in respect of the service to satisfy the Secretary that the provider is equipped to provide high quality child care appropriate to the needs of families and the community. For example, ensuring that there are enough educators to keep the children safe and providing exposure to an education plan that suits the needs, interests and cultural background of the child. Among any other relevant matters, the Secretary must have regard to the provider's ability and commitment to a range of matters, including providing a tailored, individual education program based on each child's knowledge, ideas, culture, abilities and interests, ensuring children are adequately supervised at all times, and implementing arrangements to effectively manage serious incidents.

Subsection 49(3) requires a provider in respect of the service to implement appropriate arrangements to manage any serious incident, including notifying the Secretary in writing within 24 hours of a serious incident occurring, or any circumstance that could have resulted in a serious incident. A serious incident is defined under subsection 36(4).

Subsection 49(4) provides the definition of a serious incident for purposes of subsection 49(3), which includes among other circumstances, incidents involving the death of a child while being cared for by the service, or incidents involving injury, harm, trauma to, or illness of, a child while being cared for by the service.

Subsection 49(5) requires a provider in respect of the service to implement arrangements and take measures as part of managing workplace health and safety, as specified under this subsection and also in accordance with the work health and safety (WHS) laws applicable in the State or Territory of the service.

Subsection 49(6) sets out that the term WHS laws is a reference to the *Work Health and Safety Act 2011*, any regulations or instruments made under the Act and any corresponding WHS laws within the meaning of that Act, which may be applicable in the State or Territory of the service. Terms used in subsection 49(5) have the same meaning as in the WHS laws. The relevant terms that are defined in the WHS laws are: notifiable incident, Regulator, Inspector and WHS Entry Permit Holder.

Subsection 49(8) requires a provider in respect of the service to have insurance policies in place at all times, which includes workers compensation insurance as required by law, and a current policy of insurance providing adequate cover for the service against public liability with a minimum cover of \$10,000,000.

Subsection 49(9) requires a provider in respect of the service to have, within 6 months of its approval, a written Quality Improvement Plan that meets all requirements specified under this subsection. The plan must assess the service's strengths and weaknesses against each of the seven key quality areas of the National Quality Standard of the National Quality Framework, and be available to view by the Secretary on request. The provider must supply the Quality Improvement Plan to the Secretary within six months after approval of the service.

The reference in subsection 49(9) to the National Quality Standard of the National Quality Framework is a reference to the version of the document as it existed at the time the

Minister's rules are made, being 7 November 2017. In 2017, this document was available online at: <http://acecqa.gov.au/national-quality-framework/the-national-quality-standard>.

A copy of National Quality Standard of the National Quality Framework will also be made available free of charge to people affected by, or interested in, the Minister's rules on request to the Department of Education and Training.

Subsection 49(10) requires the provider to review the Quality Improvement Plan annually. The preparation of the Quality Improvement Plan helps services that are out of scope of the National Law to assess and demonstrate their capacity to align their practices with the National Quality Framework. The submission of an annual Quality Improvement Plan is a way for these services to record their strengths and weaknesses against the seven quality areas and show a commitment to improve quality over time.

#### *Division 6 – Certain child care services not required to meet State/Territory requirements*

Division 6 identifies certain child care providers which do not need to meet particular requirements in order to be approved under the family assistance law.

**Section 50** provides that for the purpose of determining eligibility to be approved as a provider under the family assistance law, certain providers do not have to meet the eligibility requirement in paragraph 194C(a) of the Family Assistance Act. That is, the requirement that the provider obtains any approvals or licences that are needed to operate a child care service under the law of the State or Territory.

These providers are those that received funding on 30 June 2018 under the Budget Based Funded (BBF) program (due to cease prior to the commencement day), and in respect of a child care service which was not approved on that date, for the purposes of the family assistance law. This exemption does not include providers who received funding from the BBF program in respect of a service that was approved to operate a service under the family assistance law.

**Section 51** complements section 50, providing that the same providers who are exempt from State or Territory requirements under section 50 are also exempt from meeting the minimum operating period requirement under section 195C of the Family Assistance Administration Act which other providers in respect of a child care provider must meet in order to be approved. The minimum operating period for centre based day care is 48 weeks and for outside school hours care is seven weeks. This provision allows those providers exempted under section 50 to operate for the period which best suit the circumstances of their program or community.

#### *Division 7 – Consequences of breach of conditions for continued approval*

Division 7 relates to the consequences of breach of conditions for continued approval.

**Section 52** prescribes matters that the Secretary must take into account in exercising the power to impose a sanction on an approved provider under subsection 195H(1) of the Family Assistance Administration Act.

Subsection 52(3) provides matters relating to the non-compliance with a condition (or conditions) for continued approval that the Secretary must have regard to in considering

whether to impose a sanction, without limiting the types of matters that the Secretary may have regard to in exercising the power to impose a sanction. The considerations under this subsection include whether: the non-compliance appears to be an isolated incident or forms part of a history of apparent contraventions; or whether the non-compliance is minor or serious in nature.

Subsection 52(4) provides matters that the Secretary must take into account when considering which sanction to impose, without limiting the kind of sanction that may be imposed.

Paragraph 52(4)(a) relates to considering whether it would be more appropriate to impose a sanction of suspension under paragraph 195H(1)(a) of the Family Assistance Administration Act rather than a different sanction. Among any other relevant matters, these considerations include whether the non-compliance is of a systemic and ongoing nature, or is likely to result in significant debts of CCS and ACCS. The more systemic and ongoing nature of non-compliance or the higher amount of debts that likely results indicate that it is more appropriate to impose cancellation than suspension.

Paragraph 52(4)(b) relates to considering whether it would be more appropriate to impose a sanction of cancellation under paragraph 195H(1)(b) of the Family Assistance Administration Act rather than a different sanction. Among any other relevant matters, these considerations include: whether the non-compliance has resulted in significant and multiple overpayments of CCS and ACCS, or is likely to if approval is not cancelled; or whether the non-compliance indicates a deliberate or reckless disregard for, or a lack of ability to understand, the obligation to comply with a condition for continued approval.

**Section 53** prescribes matters that the Secretary must take into account in specifying the day that a revocation of a suspension takes effect, if the Secretary decides to exercise the power under subsection 195H(4) of the Family Assistance Administration Act to revoke the suspension of a provider's approval or the approval in respect of one or more child care services. Without limiting the consideration of any other matters, matters that the Secretary must have regard to include whether the Secretary is satisfied that the provider has started complying with all conditions for continued approval, and if so: whether it is appropriate to specify that the revocation of suspension is to take effect immediately; or whether the provider has demonstrated its ability to comply by a specified date in the future, and if so, whether it is appropriate to specify the likely date in the future as the day of effect.

#### *Division 8 – Backdating of approvals etc.*

Division 8 relates to the backdating of approvals in accordance with section 199G of the Family Assistance Administration Act, which allows the Minister's rules to prescribe modifications of the Family Assistance Administration Act, the Family Assistance Act, and the Jobs for Families Act in respect of certain specified persons and periods: primarily in order to ensure that, during any backdated period of approval, the law can be modified to allow providers to meet any deadlines that they have not been able to meet during the backdated period.

The provisions in this Division deal with a ***period of backdated approval*** which is the period between the time of actual notice informing a provider of their approval and any earlier period that the approval is taken to be effective from in the past as specified in the notice.



**Section 54** sets out the modifications to the Family Assistance Act and the Family Assistance Administration Act that apply to a period beginning from the day specified in the notice of approval or revocation of suspension, as relevant, as the day the approval or revocation takes effect; and ending on the day the Secretary gives the notice (the period of backdated approval).

Subsection 54(2) modifies paragraph 85CB(2)(c) of the Family Assistance Act in relation to the requirements of certification for ACCS (child wellbeing), so that a certificate of risk of serious abuse or neglect given in accordance with section 85CB can be specified to take effect earlier than 28 days before the day the certificate is given, but no earlier than the first day of ‘the period of backdated approval’ (allowing it to be given as if the approval was actually granted on the date specified in the approval notice).

*Example:* a provider of a centre based day care service makes an application for approval on 2 July 2018. The Secretary approves the provider with respect to the service for the purposes of the family assistance law on 8 August 2018, with the service approval taking effect from 2 July 2018.

Addison has been attending the centre based day care service since it first opened for business in June 2018, and the provider has a record of Addison being ‘at risk’ from the first day Addison started attending child care. With the provider’s service approval received, the centre based day care service gives a certificate on 9 August 2018 that takes effect on 2 July 2018, which is backdated more than 28 days (it is backdated 37 days). This is allowable because the approved provider can backdate a certificate for a longer period because it could not issue a certificate until it had approval, with the earliest date being the date of the provider’s service approval.

Subsection 54(3) modifies paragraph 85CH(6)(a) of the Family Assistance Act in relation to the determination of temporary financial hardship, so that the content of determination of temporary financial hardship made under section 85CH can be specified to take effect earlier than 28 days before the day the application was made, or the determination was made, but no earlier than the first day of the ‘period of backdated approval’ (allowing it to be given as if the approval was actually granted on the date specified in the approval notice).

Subsection 54(4) modifies paragraph 204B(2)(d) of the Family Assistance Administration Act in relation to the requirement to report about children for whom care is provided in respect of each week in which a session of care is provided to a child, so that the period of time in which the approved provider must submit a report in accordance with section 204B is extended to no later than 14 days after the period of backdated approval. Without this subsection allowing the modification, the relevant report could have been required to be given prior to the time that a provider actually receives approval and before they have access to the reporting system (that is, no later than 14 days after the end of the week in which the session of care was provided, or 14 days after the end of the period(s) to which a payment relates under section 205A of the Family Assistance Administration Act, or the day the enrolment notice is required to be given under subsection 200A(2) of the Family Assistance Administration Act).

Subsection 54(5) modifies subsection 204K(1) of the Family Assistance Administration Act in relation to the certification for ACCS (child wellbeing), so that the period of time in which the approved provider that gives the Secretary a certificate under section 85CB of the Family Assistance Act must notify an appropriate State/Territory body is extended to no longer than 6 weeks after the ‘period of backdated approval’. Without this subsection allowing the modification, the approved provider must, no later than 6 weeks after the day the certificate

takes effect, give an appropriate State/Territory body notice that the child whom the certificate relates to is or was at risk of serious abuse or neglect.

## **Part 5 – Provider requirements**

### *Division 1 – Requirement to notify Secretary of certain matters*

Division 1 relates to the requirement to notify Secretary of certain matters by an approved provider of an approved child care service, the failure of which results in an offence or a civil penalty liability, in accordance with section 204F of the Family Assistance Administration Act.

**Section 55** prescribes the form, manner, matters and timeframe in which an approved provider is required to notify the Secretary under subsection 204F(1) of the Family Assistance Administration Act. This provision specifies that the provider must give the Secretary written notice of the matters as set out in the table of that provision, (which will be given electronically through the use of the Child Care IT System), which outlines the matters to be notified and when notification needs to be provided. For example, a change to the name of the provider or of an approved service, including evidence of name change, must be notified within 14 days after the event. Some matters have two different timeframes that it must be notified within, depending on whether the provider is deemed to be an approved provider on the commencement day, or is a new provider approved after the commencement day. Amongst other more self-explanatory details that are set out in the table, the following information is required to be notified as part of the requirements:

- Item 1 (Fees) requires that the provider notify the Secretary of the genuine total fee that is charged by the provider of the service, including providing regular updates. Notably, item 1.1 allows the provider to notify fees either on an hourly basis, or, where fees are charged on a daily basis or in relation to sessions of care, the fee that applies daily or to the session of care (so long as the hourly length of each session of care is specified as required under item 1.2). The intent of this provision is to have on record the service's actual fee charging policies, by reference to what an individual enquiring with the service would be told is the fee for child care, disregarding any potential fee reductions or other discounts that might apply. Given the central objective of the CCS is to reduce genuine fees charged to parents, it is essential that the service's fees are transparent and available to the Secretary, and that these are consistent with what individuals enquiring at the service would be informed of.
- Item 3 (Vacancies) requires a provider to notify, by 8 pm each Friday, whether there are any anticipated vacancies for the following week at the service (being whole day or session vacancies for centre-based or FDC services or session vacancies for an outside school hours care service). Including for this purpose, a "week" is defined in subsection 3(6) of the Family Assistance Act as beginning on a Monday.
- Item 4 (Ceasing to operate) requires that a provider who does not have to notify under section 204A of the Family Assistance Administration Act, because, for example, the service is closing so that another provider can operate a service at the same location or because of closure due to poor financial performance of the service.
- Item 7 (Change to the name), for example where a provider that is a proprietary limited company that is registered under the *Corporations Act 2001* changes its name.

- Item 13 (Fit and proper person) requires the provider to be familiar with the fit and proper person requirements that are set out in section 194E of the Family Assistance Administration Act, and section 46 of the Minister's Rules. Whenever the provider becomes aware of an event or circumstance in relation to specified persons that is reasonably likely to mean the person is no longer a fit and proper person, the provider must notify the Secretary of this. For example, if the provider discovers that a person responsible for the day-to-day operation of any of the provider's approved child care services has been dishonest in giving reports to the Secretary or statements of entitlement to individuals, the provider must notify the Secretary with details of the conduct.
- Item 20 (Serious convictions or finding of guilt) requires the provider to notify the Secretary, if it becomes aware (apart from because of undertaking a check which is covered by item 12) that a person has been charged with, convicted of, or has had a finding of guilt applied to them, in respect of any of the offences listed in paragraph (a) of item 12. The provider is required to notify twice, if the person has been charged with, and then subsequently convicted of, the relevant offence.

*Division 2 – Requirements in relation to children of a prescribed class of sessions of care for which there is no eligibility for CCS*

Division 2 contains the requirements for the purposes of monitoring or investigating whether an approved FDC service of the provider is providing care in relation to children of a prescribed class of sessions of care for which there is generally no eligibility for CCS, in accordance with section 204G of the Family Assistance Administration Act.

**Section 56** imposes requirements on the approved provider that provides the session of care in circumstances outlined in subsections 8(1)(d) or 8(2) of the Minister's rules. That is, subsection 56(1) states the rules apply if the care is provided in circumstances referred to as 'child swapping', in that the child being cared for by the FDC service is the FTB child or regular care child of an FDC educator, who is working as an FDC educator that same day. In most circumstances, there is no eligibility for CCS where such care is provided, however, the provider is still required to keep a register in accordance with subsection 56(2) in order for any exemption to apply. In some circumstances, there may be eligibility for CCS, because an exemption set out in subsection 8(2) of the Minister's rules applies. For instance, the FDC educator is working for at least 2 hours in other paid work which is not for an approved FDC service. In order for the exemption to apply the provider must have documentary evidence of the exemption and must also complete the register and include specified details. Note that for each applicable exemption, the provider also has separate requirements in addition to completing the register, to keep documentary evidence as described under section 8. For instance, for an FDC educator working in another job, the provider will need to fill in the register to indicate that paragraph 8(2)(d) applies because the FDC educator works. The provider will also have to ensure it holds documentary evidence that the FDC educator is usually required to work at the time the session of care is provided.

Subsection 56(2) states that the provider must keep a register in a form and manner approved by the Secretary that sets out, among other matters, the name of the individual who would otherwise be eligible for CCS, the name of the FDC educator and the relevant child and their CRN.

Subsection 56(3) supplements the requirements for keeping a register, stating that the register must be kept up to date in relation to each relevant child and eligible individual by reference to the timeframes in which a report must be given under section 204B of the Family Assistance Administration Act. That is the provider must ensure the register is updated by the end of each fortnight after the session of care is provided. Where care is provided in a ‘child swapping’ arrangement and the entry has not been made on the register, an exemption cannot apply and therefore the care will be ineligible for CCS.

### **Part 7 – Business continuity payments**

Occasionally, approved providers may face circumstances beyond its control, which prevent compliance with the obligation to provide attendance reports about the children for whom care is provided within the legislated timeframes under section 204B of the Family Assistance Administration Act.

Business continuity payments allow an approved child care service to maintain their operating until their circumstances change and electronic reports are able to be provided. Following the provision of electronic reports, any monies provided to the service through business continuity payments will be offset against future child care service payments, and if needed recovered through other means.

Examples of circumstances that are beyond the services’ control may include, but are not limited to:

- a disruption to the operation of communication cables the service uses that cannot be rectified by the end of the relevant period; or
- the service is significantly affected by a natural disaster, such as flood, storm, fire or earthquake.

Without the attendance reports, the amounts of CCS and ACCS that may otherwise be paid in respect of the care provided by the services for the affected week cannot be calculated and paid.

The rules within this Division provide the Secretary with the discretion to determine a business continuity payment is to be made to an approved child care service and sets out the method of determining the amount of the payment.

**Section 57** outlines the circumstances in which a business continuity payment may be made for the purposes of section 205A of the Family Assistance Administration Act. Before a business continuity payment may be made, the Secretary has to be satisfied that the failure to give a report under section 204B, is directly due to circumstances which are beyond the control of the approved service, and prevent the service from giving a report required under section 204B of the Family Assistance Administration Act by the time required for the report under that provision. For example, the Secretary may be satisfied that there has been an emergency which has required the provider to relocate to a different premises that is not yet fully equipped to enable the reports to be given through the system. Payments will only be made to assist the provider as an interim measure, and do not replace the requirement to report under section 204B.

**Section 58** prescribes the method of determining the amount of business continuity payments, in accordance with paragraph 205A(2)(a) of the Family Assistance Administration Act.

This provision provides that a business continuity payment is determined by working out the sum of weekly payments calculated under section 59 (where the service previously received fee reduction amount) or section 60 (where the service has not previously received fee reduction amount) of the Minister's Rules. The sum is then rounded to the nearest multiple of \$100, however, where the amount calculated is a multiple of \$50 the amount is always rounded up. For example, a sum amount calculated as \$350 is always rounded up to \$400. However, a sum amount calculated as \$347 is rounded down to \$300, as the nearest multiple of \$100. A sum amount calculated as \$400 is neither rounded up or down as it is already a multiple of \$100.

**Section 59** provides the method of working out the sum of weekly amounts where an approved service has previously received a fee reduction amount, and therefore there is a reference point available to calculate the likely amount the provider would be paid if it were able to give the required report(s).

Subsection 59(1) specifies that where an approved service has previously been paid fee reduction amounts during a 'test period' (which is a similar period taking into account factors like school holidays, number of children in care etc.), the payment amount for each week in the business continuity period is the average weekly fee reduction amounts paid to the service for sessions of care provided during the test period.

**Section 60** provides the method of working out the sum of weekly amounts where an approved service has not previously received a fee reduction amount. The formula operates by multiplying the CCS hourly rate cap for the service (as per subclause 2(3) of Schedule 2 to the Family Assistance Act) by the estimated number of children in care for the week multiplied by 50 (the maximum hours of care per week), divided by 2.

The Secretary can estimate by the number of children in care for the week by reference to the number of enrolment notices given under section 200A of the Family Assistance Administration Act, or using other means.

## **Part 7 – Transitional rules**

### *Division 1 – Preliminary*

**Section 61** specifies that the rules contained in Part 7 are made for transitional purposes and in accordance with item 12 of Schedule 4 to the Jobs for Families Act.

### *Division 2 – Continuity of certain matters*

**Section 62** relates to the continuity of absences under section 10 of the Family Assistance Act, which sets out when a session of care is provided, in particular there can only be up to 42 allowable absences in a given financial year.

Subsection 62(1) modifies paragraph 10(2)(b) of the Family Assistance Act, so that references to an enrolment and the day that the child first attended a session of care are taken to include an enrolment and attendance that occurred before the commencement day (2 July 2018) for an approved service of a provider. However, subsection 62(2) provides that the

service is only taken to have provided the session of care due to subsection 62(1), where: the absence occurs after the child physically attended a session of care on or after 18 June 2018; and, after the absence, the child physically returns to attend a session of care at that child care service before 16 July 2018.

Subsection 62(3) modifies paragraph 10(2)(b) of the Family Assistance Act, so that an absence that occurs on 1 July 2018, is taken to be counted towards the 41 day limit in the 2018-19 financial year.

Subsection 62(4) clarifies the application of the saving provision in item 8 of Schedule 4 to the Jobs for Families Act, where a child is absent from a session of care provided by an approved child care service before the commencement day, and returns to physically attend a session of care for the first time provided by that same service (with deemed approval for CCS purposes) after the commencement day. For purposes of working out when an absence is counted towards a session of care, this provision states that a reference in subparagraph 10(2)(b)(ii) of the Family Assistance Act to ‘after the day the child first attended a session of care provided by the service’ refers to the service as approved for CCS purposes in relation to eligibility for CCB for sessions of care that occurred before commencement day.

### *Division 3 – Limitations and other matters*

Division 3 limits the periods within which certain things may be done, under the Family Assistance Act and the Family Assistance Administration Act, as in force before the commencement day, notwithstanding items 8 and 10 of Schedule 4 to the Jobs for Families Act.

**Section 63** states that reports given under section 219N of the Family Assistance Administration Act, in respect of sessions of care that occurred before commencement day may only be substituted under subsection 219N(7) within 28 days after commencement day rather than at any time. In addition, the Secretary may substitute a report under subsection 219N(7) with a report containing any information that the Secretary considers to be more accurate (the substituted report) than the submitted report, but only where the Secretary has given the relevant provider 14 days to consider the substituted report and provide any submissions in respect of its accuracy.

**Section 64** ensures that, in spite of item 9 of Schedule 4 to the Jobs for Families Act (which provides for approval in respect of services and operators that held approval immediately before commencement day), an operator and service does not have deemed approval where either: (a) they made an application after 1 April 2018 that was accepted in special circumstances; (b) the application for approval was made before 1 April 2018, but the decision in respect of the application was made on or after 1 April 2018.

**Section 65** sets out the time limit for giving certificates in relation to the special rate of CCB for periods prior to the commencement day.

Paragraph (a) specifies that, on or after the commencement day (2 July 2018) a certificate can only be given, or an application made, within 28 days after commencement day (by 30 July 2018) and can only relate to sessions of care that occurred no earlier than 28 days before commencement day (3 June 2018). The certificates or applications mentioned are those under the following provisions of the Family Assistance Act as in force before the commencement day:

- Subsections 76(1) and (2), relating to fee reductions or CCB rate certified by an approved child care service in cases where child is at risk of serious abuse or neglect, or the individual is experiencing hardship; and
- Section 81, relating to fee reductions or CCB rate determined by the Secretary in cases of hardship or where child is at risk.

Paragraph (b) clarifies that in order for an application under section 81 to be validly made after the commencement day, the application must be received by the Secretary within 28 days of the commencement day.

Paragraph (c) clarifies that a certificate under subsections 76(1) or (2) is taken to have not been given at all where it has been given before the commencement day in relation to a period after the commencement day.

**Section 66** sets out the limitations on determinations of temporary financial hardship made under section 85CH of the Family Assistance Act, as inserted by the Jobs for Families Act.

Subsection 66(1) outlines the situation where the special rate of CCB is payable in respect of the period ending before commencement day (the first period) because of a certificate given under subparagraph 76(1)(b)(ii) of the Family Assistance Act (as in force before the commencement day) and by application of section 65 of the Minister's Rules. This provision requires a determination of temporary financial hardship under section 85CH of the Family Assistance Act to include the first period in calculating the 13 weeks' limit referred to in subsection 85CH(7). However, subsection 66(2) clarifies that this limitation only applies if the event that gave rise to the hardship referred to in subparagraph 76(1)(b)(ii) of the Family Assistance Act (as existed immediately before commencement day), is the same event on the basis of which the determination of temporary financial hardship is made under section 85CH of the Family Assistance Act. This ensures that the calculation of the 13 weeks' time limit in subsection 85CH(7) is in relation to a particular child, individual and reason.

**Section 67** relates to the debts arising from overpayments made before the commencement day, under Division 2, Part 4 of the Family Assistance Administration Act (as in force before the commencement day).

Subsection 67(1) provides that in addition to the debt remaining recoverable (due to item 8 of Schedule 4), a debt arising (and as owed by either an operator or an individual) in relation to overpayments of CCB or CCR may also be recovered as if the debt was a debt of CCS or ACCS. This enables the debt to be recovered using one or more of the methods set out in subsection 82(1) of the Family Assistance Administration Act (as in force on and after the commencement day).

Subsection 67(2) further specifies that debts of CCB and CCR that arise after the commencement day or are still unpaid on commencement day may be recovered by means of reducing payments of CCS or ACCS. If this recovery method were taken, the debts referred to in subsection 67(1) are taken to have been repaid to the extent of the reduction.

Subsection 67(3) provides that after commencement day, sections 71E (ACCS provider debts – individual at fault) and 71F (CCS or ACCS individual debts – provider at fault) of the Family Assistance Administration Act (as amended by the Jobs for Families Act) also apply

in relation to debts of CCB or CCR that arise after commencement day or are still unpaid on commencement day, where:

- references to CCS or ACCS are taken to be references to CCB or CCR; and
- reference to a provider is taken to be reference to the relevant operator.

**Section 68** limits the period during which a past period claim for CCB for sessions of care that were provided by an approved child care service before the commencement day can be made under Subdivision B of Division 4 in Part 3 of the Family Assistance Administration Act (as continued in effect due to item 8). In addition to the restrictions on past period claims set out in section 49J of the Family Assistance Administration Act (as in force before the commencement day), all claims must be made before 1 July 2019. In combination with the restrictions on past period claims contained in that section, the effect of this rule is:

- for sessions of care that were provided by an approved service in the 2016-17 financial year, the past period claim must be made by 30 June 2018 *unless* the Secretary has granted an extension under subparagraph 49J(2)(b)(ii). Due to this rule, the Secretary can only grant an extension up to 30 June 2019.
- for sessions of care that were provided by an approved service in the 2017-18 financial year, the past period claim must be made by 30 June 2019.

Due to this rule, the Secretary cannot grant an extension under subparagraph 49J(2)(b)(ii) in respect of sessions of care provided in the 2017-18 financial year.

### **Explanation of the Schedules**

**Schedule 1** lists out the conditions diagnosable by a medical practitioner, for the purposes of meeting the definition of an ‘eligible disability child’ under section 8 of the Minister’s rules.

**Schedule 2** lists out the conditions diagnosable by a psychologist, for the purposes of meeting the definition of an ‘eligible disability child’ under section 8 of the Minister’s rules.